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No. 88-1905

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

EDDIE KELLER, ET AL
v.
STATE BAR OF CALIFORNIA, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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I.

SUMMARY OF ARGUMENT

The California Supreme Court conducted a careful analysis of the constitutional status and legislative structure of the State Bar of California, and found that California law envisions the State Bar as a state governmental agency, subject to the statutory and judicially-developed limitations on government speech. The California Supreme Court based its characterization of the State Bar purely on state law, in particular the unique structure of the State Bar and its place in California's governmental system. From this finding, it reached the inescapable conclusion that the remedies available to those who object to the State Bar's expenditures are the same as those available to other taxpayers, rather than in lawsuits seeking to silence the State Bar by judicial fiat.

Petitioners do not ask this Court directly to review the California Supreme Court's holding as a matter of state law that the State Bar is a governmental entity, as indeed they cannot. *See Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 483, 86 L.Ed. 1611, 62 S.Ct. 1168 (1942); *Michigan v. Long*, 463 U.S. 1032, 1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). Petitioners attempt to do so indirectly, however, by ignoring the California Supreme Court's specific factual and legal findings regarding the State Bar, and addressing their petition to the abstract issue of the limits on state bars as a generic institution. Seeking to have federal law impose a uniform structure on the diverse needs of the states, they urge this Court to decide that the abstraction petitioners label "a state bar" is akin to a labor union, and subject to the first amendment constraints developed in the union cases, constraints that have never been applied to governmental entities. Thus, in effect petitioners ask this Court to overturn the California Supreme Court's interpretation of California law.

By ignoring the specific findings made by the California Supreme Court, petitioners attempt to manufacture a conflict between the decision of the California Supreme Court and decisions of courts that have considered the limits on compulsory fees imposed by the integrated bars of other states. However, none of the cases cited by petitioners addressed those bars' role in state government as did the California Supreme Court. None of the reported cases describe integrated bars subject to substantial legislative control of their funding and review of their activities as is the State Bar of California. Because the State Bar of California is viewed as a unit of state government, no conflict exists between the California Supreme Court's application of the standard governing government speech in this case, and other courts' application of the standard governing private associations in cases involving integrated bars of states that have opted for an entirely different system.

In urging this Court to review the decision below as raising an important question of federal law, petitioners ignore the unique facts of this case and the state law issues that predominate. The California Supreme Court did not purport to decide what general rules govern the use of bar fees by integrated bars. Its holding was limited to the specific facts and state law issues presented by the California system, which do not appear to be duplicated in any other reported case. On these facts, federal law has long been settled. This Court has never permitted dissenting taxpayers to silence government speech for the obvious reason that it would critically undermine the government's ability to function.[1] The union cases cited by petitioners themselves recognize the distinction between compelled support of private organizational speech and compelled support of government speech, which is justified by the safeguards inherent in the political process as well as by the purposes and needs of government speech. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) (Powell, J., concurring). California's system therefore

[1]Petitioners incorrectly characterize the California Supreme Court's decision as upholding spending for a virtually unlimited array of political and ideological activity. Petitioners also assert that the Court ignored the first amendment issues. In fact, the California Supreme Court expressly considered the limits the first amendment places on entities like the State Bar. The Court applied to the State Bar the judicially-developed limits on electioneering by government, and in doing so, found certain speeches by a former president of the State Bar to be inconsistent with those limits. Thus, in this case, state law provides more limits on government speech than does federal law, *see infra*, § II.

raises no important federal questions that should be decided by this Court, and as a matter of comity to the judicial and legislative branches of California, this Court should decline petitioners' invitation to federalize the integrated bar.

II.

STATEMENT OF THE CASE

The State Bar Act, California Business & Professions Code §§ 6000 *et seq.*, and article VI, section 9 of the California Constitution establish the State Bar of California as a public corporation.[2] The State Bar regulates the practice of law in California, which includes the admission and discipline of attorneys, B&P Code § 6046, the arbitration of fee disputes, B&P Code § 6200, and the maintenance of a client security fund, B&P Code § 6140.5. Its focus extends beyond the economic needs of its members; its statutory mandate includes the improvement of the science of jurisprudence and promotion of the improved administration of justice. B&P Code § 6031(a). The California legislature also has commanded the State Bar to aid in specific legal projects in the public interest including the Law Revision Commission and the Commission on Judicial Performance. Government Code §§ 8287, 68725.

The State Bar is governed by a twenty-three member Board of Governors, consisting of fifteen lawyers elected by the lawyers of the State, the State Bar president, and six public members, four of whom are appointed by the

[2]All citations are to the California Code, unless otherwise indicated. Copies of the relevant statutes omitted from the petition are included in the Appendix, as are the briefs submitted by the State Bar in each of the courts below.

governor, one by the Senate Rules Committee, and one by the Speaker of the Assembly. B&P Code § 6013.5. The State Bar funds its activity primarily through fees from lawyers admitted to practice in the State, but is required to obtain explicit legislative approval before assessing any fees. Every year, the State Bar is required to submit to the Legislature a report of all projected activities and anticipated funding needs, with details on all expenditures; the documents must be in a form comparable to those prepared by all state agencies. B&P Code § 6140.1. Based on its review of that information, the legislature passes a bill authorizing assessments at the level it deems appropriate. *Id.*

The legislature exercises control over the State Bar's powers in other ways in addition to its funding. For example, in 1984, the legislature passed a statute prohibiting the State Bar from conducting any evaluations of the credentials of a specific justice absent prior review and authorization by the legislature. B&P Code § 6031(b). The legislature also requires the State Bar to conduct the majority of its business in public meetings. B&P Code § 6026.5. In 1988, the legislature mandated additional reporting requirements for the State Bar, including progress reports on all its programs, B&P Code § 6140.35, and periodic reporting on the state of attorney discipline, B&P Code § 6140.2.

State courts have applied the California Tort Claims Act to the State Bar, *Engel v. McCloskey*, 92 Cal.App.3d 870, 155 Cal.Rptr. 284 (1979), and held that its officers may claim the public official confidential communications privilege, *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 7 Cal.Rptr. 109 (1960). Nor is any of this analysis a new aspect of California jurisprudence. In rejecting a challenge to the constitutionality of the State

Bar Act sixty years ago, the California Supreme Court upheld the legislature's exercise of the police power to create the State Bar as a public, rather than a private corporation. *State Bar of California v. Superior Court,* 207 Cal. 323, 278 P. 432 (1929).

The California Supreme Court in this case reaffirmed that the state constitution, statutes and judicial decisions "envision the bar as a governmental agency." *Keller v. State Bar of California,* 47 Cal.3d 1152, 1162, 255 Cal.Rptr. 542 (1989) (submitted as Appendix A to the petition). As a governmental agency, the State Bar is entitled to use its revenues for any purpose properly within its statutory authority, subject to the limitations on government speech applicable to all state agencies in California to protect first amendment rights.[3] The California Supreme Court rejected the application of *Abood v. Detroit Board of Education,* 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) to the State Bar, correctly noting that the restrictions placed on labor unions' use of compulsory dues have never been applied to governmental agencies. 47 Cal.3d at 1163.

In reviewing the cases from other jurisdictions that had applied the labor union analogy to their integrated bars, the California Supreme Court noted important distinctions. "None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar.

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[3]In *Stanson v. Mott,* 17 Cal.3d 206, 130 Cal.Rptr. 697 (1976), the California Supreme Court limited agency participation in election campaigns, barring agencies from expending public funds to promote a partisan position. In this case, the California Supreme Court held that the State Bar's actions in connection with the 1982 judicial retention elections violated the *Stanson* rule, 47 Cal.3d at 1170-72.

None involves an extensive degree of legislative involvement and regulation." 47 Cal.3d at 1167.

III.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict With Other Decisions

Petitioners urge this Court to review this case under Supreme Court Rule 17(b), as a decision of a federal question in a way in conflict with another state court of last resort or of a Federal Court of Appeals. The conflict cited by petitioners is created wholly by petitioners' distortion of the substance of the California Supreme Court's holding; properly viewed, no conflict exists.

The California Supreme Court's decision rests on the unique structure and function of the State Bar of California; its characterization of the State Bar as a governmental agency derives solely from California law. In contrast, no such analysis was performed in any of the cases cited by petitioners. *See Gibson v. Florida Bar,* 798 F.2d 1564 (11th Cir. 1986); *Romany v. Colegio de Abogados de Puerto Rico,* 742 F.2d 32 (1st Cir. 1984); *Hollar v. Government of the Virgin Islands,* 857 F.2d 163 (3d Cir. 1988); *Arrow v. Dow,* 544 F. Supp. 458 (D.N.M. 1982); *Petition of Chapman,* 509 A.2d 753 (N.H. 1986).

The few facts concerning the status of the bars of these other states that can be gleaned from the reported decisions point toward a very different structure than that of the State Bar of California. For example, in none of the cases cited by petitioners do the funding and activities of the integrated bars appear to be subject to control by an elected legislature. *See Gibson,* 798 F.2d 1564; *Romany,* 742 F.2d 32; *Hollar,* 857 F.2d 163; *Arrow,* 544 F. Supp. 458; *Chapman,* 509 A.2d 753. Indeed, the integrated

bars of Florida, the Virgin Islands, New Mexico, Wisconsin and New Hampshire could not be subject to the type of legislative control typically exerted over state administrative agencies, because they were created by court rule and are subject only to the supervision of the judicial, and not the legislative branch. *See Gibson,* 798 F.2d at 1565; *Hollar,* 857 F.2d at 165; *Arrow,* 544 F. Supp. at 459; *Chapman,* 509 A.2d at 760 (Souter, J., concurring); *Levine v. Heffernan,* 864 F.2d 457, 458 (7th Cir. 1988). In none of these cases does the record show a governing board containing nonlawyer members appointed by elected officials. Finally, nothing in the record of any of these cases demonstrates that these other integrated bars have been treated by the state as governmental agencies.

Comparison of the Wisconsin Bar described in *Levine, supra,* 864 F.2d 457, in which the court upheld the constitutionality of the integrated bar of Wisconsin, demonstrates the difference in the policy choices among states with respect to regulation of the legal profession and justice system. Unlike the California State Bar, the Wisconsin Bar does not have sole responsibility for administering attorney discipline and continuing legal education. Indeed, the challenge to the constitutionality of the Wisconsin Bar was based on the reduction of its responsibilities in regulatory and educational areas and its purported transformation to an organization characterized as more "private" in nature.

The different relationship between the State Bar of California and the California Legislature places the State Bar squarely within the state political system subject to democratic controls not found in the descriptions of the state bars in the cases cited above. This is a key distinction for purposes of first amendment analysis. Unless a legislative majority approves of the purposes and

amounts of its spending, the State Bar is not authorized to assess fees. A legislative majority can contract and expand the State Bar's powers and provide redress not only for members of the State Bar but also for members of the general public who disagree with activities undertaken by the Bar. Indeed, in 1984, objectors to the State Bar's practice of evaluating sitting justices successfully obtained passage of B&P § 6031(b), which prohibits the State Bar from evaluating specific justices without prior legislative approval.

These are the safeguards of the democratic process that justify treating government speech differently than that of private associations such as labor unions.[4] As Justice Powell recognized in *Abood*:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is tha: the Government is representative of the people.

431 U.S. at 259 n.13.

Unlike any other court in the reported decisions discussed by petitioners, the California Supreme Court specifically found the State Bar of California, like other state

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[4]The public purpose served by the government and the fact that its ability to function would be severely undermined by granting line item veto power to dissenting minorities also justify applying a different standard to governmental expenditures. *See Autenrieth v. Cullen,* 418 F.2d 586 (9th Cir. 1969), *cert. denied,* 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970) (rejecting first amendment challenge to military spending by opponents of Vietnam War).

agencies, is subject to substantial control by the state legislature, the representatives of the people. Thus it is clear that this finding requires the imposition of a standard different from that applied in cases not involving governmental entities. This Court has never applied the labor union analogy to government, but has in fact applied quite a different analysis. *See infra,* § B.

Petitioners concede that the issues of the propriety of the State Bar's participation in the 1982 judicial retention elections and the personal liability of State Bar officials were adjudicated on state law grounds under *Stanson v. Mott, supra,* 17 Cal.3d 206, and thus are not raised in the petition. (Petition at 4 n.1) Because the *Stanson* rule applies only to California governmental agencies, petitioners thus concede that the State Bar's governmental status is a matter of state law. As the ruling of the court below that the State Bar constitutes a government agency rests purely on California law, the fact that courts in other states may have arrived at different conclusions concerning their integrated bars cannot be said to create conflicting decisions on a federal question.[5]

Petitioners attempt to manufacture a conflict on this issue by asking this Court to view the integrated bar as a generic institution that must always be treated akin to a labor union regardless of the differences in structure, purpose, and method of operation among the various state bars. But this approach is simply an indirect way of asking this Court to overrule the California Supreme

[5]This issue was not even discussed in the reported cases, so it is unclear how any of these courts would have ruled on the issue of their state bar's governmental status. This disparity between the issues presented in these cases and in this case further demonstrates the lack of conflict on a federal question that would justify review by this Court.

Court's holding that the State Bar is a unit of government and not a private association. Such an approach does violence to this Court's expressed obligations to respect the independence of state courts and allow them to develop state jurisprudence unimpeded by federal interference. *See Michigan v. Long,* 463 U.S. at 1040-41. In effect, it would federalize the integrated bar.[6]

The only federal question presented by this case is what limits the first amendment rights of dissenters place on the activities of a governmental agency. This is not an issue that was decided, or even addressed, by any of the cases cited by petitioners as in conflict with the decision of the California Supreme Court.

B. The Only Federal Question Implicated By The California System Has Long Been Settled

1. The First Amendment Does Not Restrain Government Speech Rationally Related To A Legitimate Governmental End

Petitioners alternatively urge review of this case under Supreme Court Rule 17(c) as raising important issues of federal law that should be resolved by this Court. However, this Court already has addressed and consistently has rejected first amendment challenges by opponents of

[6]Labor law is highly federalized by the National Labor Relations Act and its amendments in the Labor Management Relations Act, 29 U.S.C. §§ 141 et seq., as well as by the Railway Labor Act, 45 U.S.C. 151 et seq. State labor regulation is limited by broad principles of federal preemption, *see, e.g., Garner v. Teamsters Local 776,* 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953). Thus, the states never have been free to develop their own concepts of unionism outside the long shadow of federal law. By contrast, Congress left the field of regulation of the practice of law entirely to the states.

governmental spending, and the petition demonstrates no reason for this Court to revisit the issue.

In *American Party of Texas v. White*, 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974) this Court rejected an equal protection challenge based on speech and associational rights to the Texas legislature's use of revenues to reimburse the two major political parties for primary expenses. This Court again rejected a taxpayer challenge to government funding of speech in *Regan v. Taxation with Representation of Washington*, 461 U.S. 609, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983), holding that government may spend tax revenues on speech activities subject only to a showing that the expenditure is rationally related to a legitimate governmental objective. As the Court noted in *FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984), virtually every legislative appropriation will to some extent involve a use of public money as to which some taxpayers may object. "Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." 468 U.S. at 385 n.16.

Miller v. California Commission on the Status of Women, 151 Cal.App.3d 693, 198 Cal.Rptr. 877, *appeal dismissed for want of jurisdiction*, 469 U.S. 1133, 83 L.Ed.2d 15, 105 S.Ct. 64 (1984), a case involving substantially similar factual and legal issues to those presented here, illustrates how these well-settled principles apply to this case. In *Miller*, plaintiffs challenged a governmental agency's speech addressing the status of women, postulating "their right not to enhance the Commission's speech by tax support." 151 Cal.App.3d at 700. The California Court of Appeal rejected this challenge, noting that if the government cannot appoint a commission to speak on a controversial topic without implicating dissenting taxpayers'

first amendment rights, it would lose its ability to govern. 151 Cal.App.3d at 701. The Court noted the availability of means within the democratic process for dissenters to seek redress, including speaking out at the Commission's public meetings and using the electoral process to defeat legislators who appointed the commissioners and supported their positions. *Id.* at 702. This Court dismissed the appeal for want of jurisdiction. The present petition retraces that very same ground, without raising any distinguishing factual or legal issues.

2. All Government Speech Is Subject To The Same Standard Regardless Of The Source Of The Revenue Spent

The fact that the license fees at issue in this case are not drawn from the entire populace does not affect the first amendment analysis, which derives not from the source of the revenue that is spent, but from the fact that the government spending itself is subject to the controls of the democratic process. *See Abood, supra,* 431 U.S. at 259 n.13 (Powell, J., concurring).[7] In *United States v. Lee,*

[7]Indeed, in the labor union cases, this Court focussed on the purpose of the compelled contributions, and the nature of the entity, rather than relying on the source of the funding as the key to its analysis. For example, in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* 466 U.S. 435, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984), the Court looked to the purpose of compulsory union support under the Railway Labor Act and found it to be elimination of the "free rider" effect. 466 U.S. at 447. Although in *Abood* the Court refused to distinguish between expenditures by unions in the private sector and those by unions in the public sector, this was because the purpose justifying compulsory support was substantially similar in both instances. *See* 431 U.S. at 232 (union security issue the same in both private and public sector). Accordingly, expenditures from compulsory dues in both sectors must be limited to those germane to this statutory purpose. *(footnote continued on next page)*

455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982), this Court rejected a first amendment challenge to payment of social security tax based on the challenger's objection to governmental use of the revenues. This Court found no principled basis to distinguish between the use of general taxes and the use of taxes from a more narrowly drawn pool, such as employers subject to social security taxes, for the purpose of first amendment analysis. 455 U.S. at 259-60. *See also Erzinger v. Regents of the University of California,* 137 Cal.App.3d 389, 187 Cal.Rptr. 164 (1982), *cert. denied,* 462 U.S. 1133, 77 L.Ed.2d 1368, 103 S.Ct. 3114 (1983) (rejecting first amendment challenge to use of mandatory student health fees for abortion counseling). Under federal law, a governmental agency may use unrestricted revenue whether derived from taxes, dues, fees, tolls, tuition, donation or other sources for any purposes within its authority. The same is true in California, subject to the additional restrictions imposed by *Stanson v. Mott, supra.*

C. This Court Should Not Reach Out To Take A Case So Dependent On Issues Of State Law

The decision below is of limited impact beyond California. As the California Supreme Court affirmed the constitutionality of the State Bar's expenditures based on the State Bar's status as an agency of the State of California, the state law issues are inextricably intertwined with the federal constitutional issue. Thus, not only is review of this case not justified under Supreme Court Rule 17(c),

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The purpose of compulsory support of government is, of course, far broader, extending well beyond support of any one interest group. L. Tribe, *American Constitutional Law* § 12-4 at 807 (1988) (distinguishing government speech from compelled support of union speech).

but also prudential concerns of due deference to state court interpretation of state law counsel against it.[8]

There is no need for a federal rule mandating uniform treatment of all state bars. States should be free to make policy choices on how to regulate the legal profession in response to their diverse circumstances, as they are free to formulate other legal relationships. *See* P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* at 533 (3d ed. 1988) Treatment of state bars should be responsive to and reflective of this diversity.

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[8]Because of this controlling state law issue, the issues presented by this case do not address any questions left open by this Court's prior examination of a challenge to an integrated bar. In *Lathrop v. Donahue,* 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961), while upholding the constitutionality of the integrated bar of Wisconsin, created by the Wisconsin Supreme Court as an "association . . . composed of persons licensed to practice law in this state," 367 U.S. at 825, this Court refused to rule on the constitutionality of its expenditures in the absence of a well-developed factual record. No finding that the Wisconsin Bar constituted a unit of state government was before the Court, and the various members of the Court appeared to assume otherwise. *See, e.g.,* 367 U.S. at 881-82 (Douglas, J., dissenting) (lawyers should be free not to join an association of other lawyers).

Justice Harlan's discussion of government speech standards as a useful analogy for viewing the case demonstrates that he did not view the case as actually presenting this issue, and his formulation of government speech standards went unchallenged by either the plurality or the dissent. *See* 367 U.S. at 858 (Harlan, J., concurring) (taxpayer's objections to views governmental agency presents to the legislature at public expense do not implicate first amendment).

IV.

CONCLUSION

The decision of the California Supreme Court presents neither a conflict with other reported decisions on the same issue, nor an important question of federal law requiring resolution by this Court. It rests squarely on the state laws that create the State Bar of California as an arm of government and on well-established federal and state principles controlling government speech. The deference this Court repeatedly urges toward state court interpretation of state constitutional and regulatory schemes, and the need to avoid unnecessary constitutional decisions, counsel against the granting of the petition for certiorari. Accordingly, respondents respectfully request this Court to deny the petition for writ of certiorari to the California Supreme Court.

DATED: JUNE 21, 1989

Respectfully submitted,

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APPENDIX A

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§ 6140.1. Proposed baseline and proposed final budgets; contents; fiscal bill; submission of documents; budget change proposals

The State Bar annually shall submit its proposed baseline budget for the following fiscal year to the appropriate fiscal committees of the Legislature and the Joint Legislative Budget Committee by November 15, and its proposed final budget by February 15, so that the budget can be reviewed and approved in conjunction with any bill that would authorize the imposition of membership dues. Each proposed budget shall include the estimated revenues, expenditures, and staffing levels for all of the programs and funds administered by the State Bar. Any bill that authorizes the imposition of membership dues shall be a fiscal bill and shall be referred to the appropriate fiscal committees; provided, however, that the bill may be approved by a majority vote.

The State Bar shall submit the budget documents in a form comparable to the documents prepared by state departments for inclusion in the Governor's Budget and the salaries and wages supplement. In addition, the bar shall provide supplementary schedules detailing operating expenses and equipment, all revenue sources, any reimbursements or interfund transfers, fund balances, and other related supporting documentation. The bar shall submit budget change proposals with its final budget, explaining the need for any differences between the current and proposed budgets.

* * *

(Added by Stats.1986, c. 2, § 2, eff. February 4, 1986. Amended by Stats.1986, c. 1510, § 2; Stats.1987, c. 688, § 3; Stats.1988, c. 1149, § 2.5)

Underline indicates changes or additions by amendment

§ 6140.2. Reports to judiciary committees on procedural changes and improvements in disciplinary system; reduction of complaints in inventory; goal for timely disposition of complaints

(a) On or before April 1, 1986, and June 1, 1986, the State Bar shall submit reports to the Judiciary Committees of the California State Senate and Assembly on the procedural changes and improvements which have been made in the State Bar disciplinary system and what effect these changes have had on the number of complaints pending, the time required to process these complaints, and the progress made in reducing the backlog of complaints.

(b) On or before December 31, 1987, the State Bar shall reduce by 80 percent the complaints within its inventory as of March 31, 1985, which have been received but have not resulted in dismissal, admonishment of the attorney involved, or filing of formal charges by State Bar Office of Trial Counsel. This reduction shall be accomplished by dismissal, admonishment of the attorney involved, or recommendation by the State Bar for disposition by the Supreme Court.

(c) The State Bar shall set as a goal by December 31, 1987, the improvement of its disciplinary system so that no more than six months will elapse from the receipt of complaints to the time of dismissal, admonishment of the attorney involved, or the filing of formal charges by the State Bar Office of Trial Counsel.

(Added by Stats.1986, c. 2, § eff. February 4, 1986.)

§ 6140.5. Client security fund; establishment; payments; administration; funding

(a) The board may establish and administer a Client Security fund to relieve or mitigate pecuniary losses caused by the dishonest conduct of those active members of the State Bar. Any payments from the fund shall be discretionary and shall be subject to such regulation and conditions as the board shall prescribe. The board may delegate the administration of the fund to the disciplinary board provided for in Section 6086.5, or to any board or committee created by the board of governors.

(b) Commencing January 1, 1972, the board may increase the annual membership fees fixed by it pursuant to Section 6140 by an additional amount per active member not to exceed ten dollars ($10) in any year, the additional amount to be applied only for the purposes of the fund.

(Added by Stats.1971, c. 1338, p. 2642, § 3.)

§ 6140.35. Progress reports; duration of section

(a) The board shall annually present written and oral progress reports on all State Bar programs to the Judiciary Committees of the Senate and Assembly, as directed by those committees.

(b) This section shall remain in effect until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1992, deletes or extends that date.

(Added by Stats.1988, c. 1159, § 29.)

§ 6200. Establishment of system and procedure; applicability of article; voluntary or mandatory nature; rules; immunity of arbitrator; powers of arbitrator

(a) The board of governors shall, by rule, establish, maintain, and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. The rules may include provision for a filing fee in such amount as the board * * * may, from time to time determine.

(b) This article shall not apply to any of the following:

(1) Disputes where the attorney is also admitted to practice in another state, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

(2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203.

(3) Disputes where the fee to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

(c) Arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client.

(d) The board of governors shall adopt rules to allow arbitration of attorney fee disputes under this article to proceed under arbitration systems sponsored by local bar associations in this state. Rules of procedure promulgated by * * * local bar associations are subject to review by the board * * * to insure that they provide for a fair, impartial, and speedy hearing and award. In adopting or reviewing these rules, the board * * * may provide for one lay member of any arbitration panel of three arbitrators.

(e) In any arbitration conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, the arbitrator or arbitrators, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings.

(f) In the conduct of arbitrations under this article the arbitrator or arbitrators may do allof the following:

(1) Take and hear evidence pertaining to the proceeding.

(2) Administer oaths and affirmations.

(3) Compel, by subpoena, the attendance of witnesses and the production of books, papers, a documents pertaining to the proceeding.

(Added by Stats.1978, c. 179, p. 2249, § 1. Amended by Stats. 1984, c. 825, § 1.)

§ 6046. Examining committee; powers

The board may establish an examining committee having the power.

(a) To examine all applicants for admission to practice law.

(b) To administer the requirements for admission to practice law.

(c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter.

The examining committee shall be comprised of 19 members, 10 of whom shall be members of the State Bar

or judges of courts of record in this state and nine of whom shall be public members who have never been members of the State Bar or admitted to practice before any court in the United States. At least one of the attorney members shall have been admitted to practice law in this state within three years from the date of their appointment to the examining committee.

(Amended by Stats.1986, c. 1392, § 1; Stats.1988, c. 1159, § 2.3.)

§ 8287. Assistance from board of governors of bar

The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties.

(Formerly § 10307, added by Stats.1953, c. 1445, p. 3037, § 2. Renumbered § 8287 and amended by Stats.1984, c. 1335, § 2.)

§ 68725. Assistance and information

State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission.

(Added by Stats.1961, c. 564, p. 1683, § 1.)

APPENDIX B

APPENDIX B

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

EDDIE KELLER, et al.,
Petitioners and Plaintiffs,

vs.

STATE BAR OF CALIFORNIA, et al.,
Respondents and Defendants.

CIV. NO. 307168

NOTICE OF MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATIONS IN SUPPORT THEREOF

Date: December 5, 1983
Time: 9:00 a.m.
Place: Department 21

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 5, 1983, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Department 21 of the above-captioned Court, at 720 Ninth Street, Sacramento, California, defendants State Bar of California, Anthony M. Murray, Patricia Greene, Girt K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Louks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. David, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward and Joon Hee Rho will move this Court for an order granting summary judgment in their favor. Defendants will move, in the alternative, for summary adjudication of issues, or for judgment on the pleadings.

This motion will be based on this Notice of Motion, the Memorandum of Points and Authorities and Declarations in Support Thereof, and all other papers and pleadings on file in this action.

DATED: November 15, 1983.

Respectfully submitted,

HUFSTEDLER, MILLER, CARLSON
& BEARDSLEY
ROBERT S. THOMPSON
DENNIS M. PERLUSS
LAURIE D. ZELON
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By LAURIE D. ZELON
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants, the State Bar of California and members of the Board of Governors of this public agency, seek an order of this honorable court granting judgment on behalf of the agency and on behalf of each individual member. In the alternative, defendants' motion seeks a judgment on the pleadings or an order that all dispositive issues now raised by plaintiffs' complaint are determined in defendants' favor. If summary judgment is granted the matter will be concluded. If the alternative motions are granted plaintiffs may seek leave to amend.*

Plaintiffs' complaint seeks to enjoin all activity of the State Bar encompassed in the following categories:

(a) lobbying the California Legislature;

(b) submitting briefs *amicus curiae;*

(c) financing meetings of the Conference of Delegates;

(d) publicizing the speeches by the President of the State Bar; and

(e) financing the public information project on judicial retention.

Complaint, ¶ 6.

It also seeks to hold the individual defendants liable for past expenditures of the State Bar utilized to finance its activities in these categories. Plaintiffs seek reimbursement of all fees expended for "political and ideological purposes" (Prayer, ¶ 3), without further specifying those activities.

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*We do not concede that leave to amend should be granted.

We demonstrate in more detail in the following portions of this memorandum that:

1. the State Bar is an agency of the California state government created by Article VI, § 9 of the California Constitution and implementing legislation;

2. because the State Bar is an agency of government it has all powers expressly or implicitly granted it by the Constitution and statute, limited only by restrictions imposed by the Constitution. *Stanson v. Mott,* 17 Cal.3d 206 (1976);

3. each category of State Bar activity and each specific activity of the State Bar mentioned in the complaint is expressly or implicitly authorized by the California Constitution and the State Bar Act. This authorization is confirmed annually by the Legislature in enacting legislation providing for financing the State Bar after receiving the agency's proposed budget for the ensuing year;

4. no constitutional restriction precludes the State Bar from engaging in the categories of activity described in the complaint or the specific functions mentioned in it. To the contrary, two decisions of the United States Supreme court issued since the complaint was filed reject the constitutional attack mounted by plaintiffs. *Regan v. Taxation with Representation of Washington,* ___ U.S. ___, 76 L.Ed. 2d 129 (1983); *Common Cause v. Bolger,* ___ U.S. ___, 77 L.Ed.2d 280 (1983);

5. the authorities upon which plaintiffs relied in their unsuccessful motion for preliminary injunction are inapplicable to agencies of government. They are pertinent only to the affairs of private organizations; and

6. a controlling decision of the California Supreme Court mandates rejection of plaintiffs' claim that the individual members of the Board of Governors of the State Bar are liable. *Stanson v. Mott, supra.*

II. PROCEEDINGS TO DATE

Plaintiffs' complaint seeking declaratory and injunctive relief was filed on October 25, 1982. Subsequent amendments, adding plaintiffs, have been filed without changes in the substantive allegations. As set forth above, plaintiffs challenged the expenditures of the State Bar for "political and ideological causes," and sought to enjoin such expenditures and to require individual members of the Board of Governors to refund fees used for those purposes. Except for the five items listed in paragraph 6 of the Complaint, and set out above, plaintiffs failed to state with specificity the activities to which they object. Rather, they seek relief banning all such use of fees, whether or not such uses are related to matters within the scope of the Bar's statutory and constitutional authorization.

On October 26, 1982, pursuant to plaintiffs' motion, a Temporary Restraining Order and Order To Show Cause was issued. Although plaintiffs sought broader relief, the TRO only prohibited the expenditure of named plaintiffs' fees to promote "particular criteria regarding the evaluation of judges in judicial retention elections." Order, October 25, 1982, at 2.

Subsequently, plaintiffs' motion for preliminary injunction was brought on for hearing on January 28, 1983. On March 4, 1983, the Court denied that motion and dissolved the temporary restraining order then in effect.* The Court declined to grant injunctive relief, finding it unlikely that plaintiffs would prevail. Order at 2. The Court also found that plaintiffs had failed to demonstrate irreparable injury, *Id.* at 3.

Since that hearing, plaintiffs have propounded discovery requests to defendants, to which responses have been served.

III. THE INJUNCTIVE RELIEF REQUESTED BY PLAINTIFF IS NOT AVAILABLE AS A MATTER OF LAW

As will be demonstrated below, plaintiffs' requested relief is directly contrary to that approved even by the authority on which they rely. Further, and more importantly, plaintiffs ignore the very relevant distinctions between the California State Bar, a public agency of the State of California with both statutory and constitutional authority, and a private organization formed to serve the economic interests of its membership. This distinction is one recognized as a matter of federal and California law. As a result, plaintiffs request this Court to grant relief contrary to relevant federal and state authority. Therefore, summary judgment should be granted.

A. The State Bar is an Agency of State Government

As set forth in Defendants' Memorandum of Points and Authorities in opposition to the Motion for Preliminary Injunction ("Defendants' Memorandum"),** the defen-

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*On December 2, 1982, the Court entered an order continuing the hearing on the preliminary injunction and ordering that all fees paid by named plaintiffs be held in a separate account pending that hearing.

**A copy of that Memorandum is attached hereto for the convenience of the Court as Exhibit A.

dant State Bar is a public agency of the State of California, and its conduct is governed by the rules applicable to California state agencies. Defendants' Memorandum at pp. 14-15. Thus, its expenditures are proper to the extent that "they are authorized, explicitly or implicitly, by legislative enactment." *Stanton v. Mott*, 17 Cal.3d 206, 213 (1976). As such, the State Bar is a substantially different entity than the union to which plaintiffs seek to compare it. Its function and purposes are public, not private. It is a part of state government and the authorization for its expenditures and functions is both explicit and implicit.

B. The State Bar May Engage in All Activities Expressly or Implicitly Authorized by The State Constitution or Statute

1. The State Bar Has Broad Explicit Authorization

The State Bar has broad legislative authorization under Bus. & Prof. Code §§ 6001, 6028, and 6031. That latter section provides:

> "The Board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the Bar with the public."

In addition, the State Bar is established by the Constitution of the State of California. Article VI, § 9. This constitutional provision was approved by the voters in 1960. *See* Defendants' Memorandum at pp. 6-8.

Finally, a detailed report of the expenditures and activities of the State Bar is submitted to the Legislature on an annual basis in seeking legislative approval of fees. The Legislature approves those activities in setting the permissible fees to be charged by the State Bar each year

on the basis of this submission. *See, e.g.*, material submitted to Legislature attached as Exhibits 1-2 to Defendants' Memorandum.

(2) *The State Bar Has Implicit Authorization For The Challenged Activities*

a) *Lobbying*

Lobbying of the Legislature concerning issues within the scope of Bus. & Prof. Code § 6031 has the explicit and implicit approval of the Legislature. It is explicitly approved on an annual basis by means of the fees bill, as set forth above. It is implicitly approved by prevailing California case law, exemplified by the leading case of *Stanson v. Mott, supra.* In that case, the Court specifically approved lobbying efforts even though such efforts might be for causes with which members of the public might disagree. 17 Cal. 3d at 218. Despite this authority, however, plaintiffs would have this Court bar the State Bar from all lobbying activities outside of the areas of admissions, discipline, and fees despite the specific authorization which the Bar has been given. Complaint, ¶ 6.

That California law clearly permits public agencies to lobby is beyond challenge. *See Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318 (1927); *Lehane v. City & County of San Francisco*, 30 Cal. App. 3d 1051 (1972). Indeed, the *Lehane* case makes clear that lobbying is permitted even though the individual taxpayer objects to the position which the state agency is taking.

> "If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of the government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in

> others, his recourse is to vote against them." 30 Cal. App. 3d at 1056.

See also DeMille v. American Federation of Radio Artists, 31 Cal. 2d 139 (1947) (majority rule permits imposition of a tax despite disagreement by a taxpayer with the purposes for which the tax is levied).

b) *Dissemination of Information To The Public*

Public agencies may also expand funds to inform potential voters about issues with which they are familiar, so long as a fair presentation of facts is made. *See Stanson, supra,* 17 Cal. 3d at 221 n.6; 58 Ops. Cal. Atty. Gen. 29 (1975); 51 Ops. Cal. Atty. Gen. 190 (1968); 42 Ops. Cal. Atty. Gen 25 (1963); 35 Ops. Cal. Atty. Gen. 112 (1960). Plaintiffs seek specifically to bar such activity by objecting to the education project on the judiciary. Complaint ¶ 6. However, plaintiffs do not allege anywhere in their complaint that the materials assembled for that project are anything other than a fair presentation of facts and of such style and tenor that they constitute a proper attempt to inform the voters about issues concerning which the Bar has special knowledge and unique responsibilities. Rather, plaintiffs merely assert that the project is political or ideological and thus improper. That bare assertion is incorrect.

The relevant cases cited above permit, and may even require, the State Bar to educate the public in this area. The materials in the project present information to the public, without exhorting the public to vote for a specific position. The materials used were attached to the complaint as Exhibit E; the plaintiffs had access to those materials and an opportunity to review them, but could find no grounds on which to challenge them under California law. If this Court should analyze these materials, despite the absence of any specific allegations, it will find

the materials to be fair and balanced, not improperly motivated or styled.

c) *Other Activities*

The State Bar's authority within other major challenged areas is established by California law. Plaintiffs object to substantially all of the State Bar's other activities, some specifically, but most generally. The Bar has already addressed such of those issues as plaintiffs identified in their complaint in Defendants' Memorandum at 17-28, and respectfully refers the Court to that discussion.

Plaintiffs seek to, but may not, stop the State Bar from engaging in activities because plaintiffs apparently disagree with the positions taken by the Board of Governors, chosen in a democratic manner to set such policies. Such disagreement does not permit the silencing of the entire bar. *See Lehane, supra,* 30 Cal.App.3d at 1056. This doctrine has been clearly recognized outside of California as well.

> "It is true that [a member of the State Bar] is required to contribute to the cost of the operation of the State Bar, and he may not agree with all of the policies as determined by its Board of Governors. The Board of Governors is selected in a democratic manner. It is frequently true in a democratic society that the wishes of the majority are overruled, even though they must contribute to the cost of the programs carried forward by the majority." *Sams v. Olah,* 225 Ga. 497, 505 (Ga. Sup. Ct. 1969).*

In *Sams,* the court concluded that the test for illegal expenditures is not a broad test of whether the funds are

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* A copy of this opinion is attached hereto for the convenience of the Court as Exhibit B.

being spent contrary to the individual's wishes, but rather whether the funds were spent for the authorized purposes of the State Bar. 225 Ga. at 507. By this reasoning, the most plaintiffs could seek to bar would be those activities demonstrably outside of the activities authorized by the Constitution and the Legislature.

However, plaintiffs' approach is categorical; the defense may similarly be categorical. So long as the State Bar engages in activities which are appropriate under California law, as they do, plaintiffs are not entitled to the extremely broad relief they request. Plaintiffs seek no limited, alternative relief, nor do they allege that authority might exist for any specific, focused relief such as the rebate procedure approved in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976). However, such a procedure would not be authorized by authority relevant to this case, even had plaintiffs requested it. As a result, their complaint must be dismissed.

C. The Challenged Activities Are Constitutional

Defendants' position is further authorized by recent decisions of the United States Supreme Court. The Court has clearly stated that the government may, in certain instances, use tax dollars to subsidize issue-oriented speech. There need be no compelling governmental interest to support this decision, but only a rational relationship to legitimate governmental purposes. *Regan v. Taxation With Representation of Washington*, ___ U.S. ___, 76 L.Ed.2d 129 (1983). (A copy of this opinion is attached hereto for the convenience of the Court as Exhibit C.) The same test is mandated by the applicable California authority cited above, and governs this case.

In addition the Court last term affirmed without opinion the decision of a three-judge District Court in *Common Cause v. Bolger*, ___ U.S. ___, 77 L.Ed.2d 280

(1983). In that case, the Court held that incumbent legislators may use the franking privilege without violating the constitutional rights of voters and nonincumbents. The court declined to apply a strict scrutiny analysis, because any restriction on First Amendment rights was indirect and, because it applied to all non-incumbents, was not content-related. The same is true here; any restriction is indirect and applies to all who disagree with the majority position on a broad spectrum of issues, not to any particular position.*

The State Bar speaks as a government agency and must be governed by this law in all respects. Although plaintiffs allege that the State Bar purports to represent the views of its individual members, that claim is demonstrably without basis in fact and is merely an unsupportable conclusion. The State Bar speaks as a constitutional and statutory body. *See* Affidavits of Peter Jensen and Terrance Flanigan, lobbyists for the State Bar, attached hereto as Exhibits E and F; State Bar's Answers to Plaintiffs' Interrogatory No. 3, attached hereto as Exhibit G.

D. The Authorities Previously Relied On by Plaintiffs Are Inapplicable

Plaintiffs have relied primarily on *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), and *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982) for their claim for relief in this case. However, as set forth by defendants in Defendants' Memorandum at 28-33, that authority does not govern here.

Abood governs where mandatory fees are imposed by a private organization, in that case, a union. The State Bar,

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* A copy of this opinion is attached hereto for the convenience of the Court as Exhibit D.

in contrast, is a legislatively and constitutionally authorized agency of the government of the State of California. The difference is both substantial and vital. Integrated state bars, as governmental agencies, must be treated differently from private organizations as a matter of federal constitutional law. *State Bar of Texas v. United States of America*, No. CA 3-81-9536-C, United States District Court for the Northern District of Texas, Dallas Division, March 25, 1983 (Slip opinion at 4).* *See also Sams v. Olah*, 225 Ga. 497, 506 (Ga. Sup. Ct. 1969) (integrated state bar is not a labor organization).

There are other differences as well. The private organization in *Abood* set its own dues; in contrast, the fees of the State Bar are set by the California State Legislature. The difference between private assessments and legislatively approved taxes is substantial.

In addition, the purpose of the State Bar, as defined by its establishing authority, is broad; the Bar is instructed to undertake substantial duties in the public interest. In contrast, a labor union serves limited economic interests of its membership; in some situations, those members may be able, through the bargaining process, to extract from non-members a *pro rata* share of the expenses connected with the economic benefits those non-members receive. *See Abood, supra,* 431 U.S. at 222. In other instances, the union may, through bargaining, be able to require membership. In such cases, mandatory dues may only be spent for functions related to the benefits provided. See *Ellis v. Brotherhood,* 685 F.2d 1065 (9th Cir. 1982), *cert. granted* ___ U.S. ___ (1983).**

* A copy of this opinion is attached hereto for the convenience of the Court as Exhibit H.

**The Court in *Ellis* declined to take a narrow view of those activities which provided benefits to members and for which they could be forced to contribute. This should be contrasted with the extremely limited view of scope sought to be imposed by plaintiffs in this case.

Even if the union analogy were apposite, however, *Abood* specifically rejected the relief requested herein. Plaintiffs therefore rely on *Arrow v. Dow, supra*, to provide the nexus to the relief they request. However, *Arrow* is not only inconsistent with the decisions of the California Supreme Court cited above, but also, by permitting broad relief prohibiting all "political" activities, violates the rule set out in *Abood*.

The broad reading adopted by the *Arrow* court has been rejected in the recent decision of the Florida Supreme Court. In *The Florida Bar Re: Amendment to Integration Rule*, No. 61,424, decided September 22, 1983, the Supreme Court held that political activity by its bar, established by rule of Court, was within the defined purpose of the bar "to improve the administration of justice, and to advance the science of jurisprudence." Opinion at 2. The Court, in determining whether the challenged activities were germane, looked broadly at purpose, as the *Arrow* court failed to do. (A copy of the Opinion is attached hereto for the convenience of the Court as Exhibit I.)

Arrow is also inapplicable to the California State Bar factually, in that it involves a bar association established by rule of court, not by constitutional and legislative authorization. The California State Bar is, however, a unique institution among unified state bars, as it is a state agency, with both constitutional and legislative authorization, and subject to legislative oversight. It is neither a private organization, nor an organization created under the limited authority of rule of court. The New Mexico Bar does not have the broad mandate imposed on the California Bar. As the scope of authorized activity is central to the *Abood* analysis, this difference is substan-

tial and indicates that *Arrow* cannot control here. Thus, plaintiffs have no authority for the relief they request.

IV. THE INDIVIDUAL MEMBERS OF THE BOARD OF GOVERNORS CANNOT BE HELD LIABLE

Plaintiffs seek relief involving restitution of the sums spent for allegedly inappropriate activities from the individual members of the Board of Governors. However, plaintiffs' complaint contains no allegations concerning the individual members of the Board of Governors other than the fact that they are members of the Board of Governors. There are no allegations that these members acted in bad faith, or in any way outside of the scope of their duties as members of the Board of Governors. Under these circumstances, there is no authority for any such restitutionary order.

In fact, California state law is to the contrary. *Stanson v. Mott*, 17 Cal.3d 206 (1976), specifically overruled an earlier decision of the California Supreme Court establishing strict liability for public officials authorizing the improper expenditure of public funds. 17 Cal.3d at 223, *overruling Mines v. Delvalle*, 201 Cal. 273 (1927). The *Stanson* court adopted instead the requirement that public officials use

> " 'due care,' i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care." 17 Cal.3d at 226-27.

Various factors were set forth by the Court in determining whether a public official acted with the requisite due care.

They were:

> 1. whether the expenditure's impropriety was obvious;
>
> 2. whether the official knew of the possible invalidity of the expenditure;
>
> 3. whether the official relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision. 27 Cal.3d at 227.

Plaintiffs have made no allegations relating to any of these standards. Although the plaintiff in *Stanson v. Mott* was permitted to amend his complaint, this permission was granted because, under the existing rule prior to *Stanson*, no such allegations were required. However, such is not the case here. The *Stanson* standard has been the law since 1976, and plaintiffs are bound by it.

Further, even accepting all of plaintiffs' allegations in the complaint as true, there are and can be no allegations which indicate that any expenditures were obviously improper, that any member of the State Bar Board of Governors knew of any potential invalidity, or that the State Bar Board of Governors did not rely on the presumption of validity given by the legislative approval of its activities. Such allegations could not be made, in light of the Legislature's actions, and the long-standing rule of governing public agencies in California.

There is simply, no basis for plaintiffs' attempt to obtain restitution from the individual members of the Board of Governors. Thus, in any event, the summary judgment in favor of these defendants should be granted, dismissing them from the lawsuit with prejudice.

V. CONCLUSION

For the reasons set forth above, defendants respectfully request that this Court grant their motion for summary judgment.

DATED: November 15, 1983.

Respectfully submitted,
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Attorneys for Defendants

APPENDIX C

APPENDIX C

COURT OF APPEAL, STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN PATRICK J. NOLLAN; AND A. WELLS PETERSEN,
Appellants,

VS.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GERT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUCKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; PHYLLIS M. HIX; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; AND JOON HEE RHO,
Respondents.

3rd Civil No. 24124
(County No. 307168)

APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO COUNTY HONORABLE HORACE E. CECCHETTINI, JUDGE

RESPONDENTS' BRIEF

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I. INTRODUCTION

This brief is submitted on behalf of respondents, State Bar of California, Anthony M. Murray, Patricia Greene, Gert K. Hirschberg, Leland R. Selna, Jr., Geoffrey Van Loucks, Thomas W. Eres, John J. Costanzo, George W. Couch, III, Burke M. Critchfield, Thomas R. Davis, Dixon Q. Dern, Ruth Church Gupta, Dale E. Hanst, Leonard Herr, Robert A. Hine, Marta Macias, Phillip Schafer, Craig A. Silberman, Daniel J. Tobin, James D. Ward, and Joon Hee Rho. Respondents respectfully submit that the decision of the trial court was correct, as the relief requested by plaintiffs-appellants is unavailable as a matter of law.

The State Bar, as a governmental agency, is governed by both statutory and constitutional regulations and restrictions. As this brief will demonstrate the applicable constitutional limitations are not those set forth in the labor union cases on which appellants rely; rather, the relevant authority weighing the balance between First Amendment rights and government activities is consistent with the decision below.

Appellants, in attacking the trial court's decision, have mischaracterized the basis of that ruling. While it is true that the Court relied on *Stanson v. Mott*, 17 Cal. 3d 206 (1976), in upholding the right of the State Bar to engage in the challenged activities, the court did not hold that, under *Stanson*, a public agency *could* not violate the First Amendment. (Appellants' Opening Brief ("A.O.B.") at 2.) Rather, the court correctly read *Stanson* as saying that, under the rules established there, the State Bar *had* not violated the First Amendment. That the limits established in *Stanson*, and complied with by the State Bar, are the appropriate limits was clearly restated by this Court

in *Miller v. California Commission on Status of Women*, 151 Cal. App. 3d 693 (1984).

Appellants make a categorical attack on major activities of the State Bar; they do not identify or challenge specific problems. Nor do they seek to remove restrictions on their own right to speak and associate; no restrictions have been imposed. Rather, appellants seek to prevent others from freely speaking and associating. Under the applicable authority of the United States Supreme Court, the California Supreme Court, and this honorable Court, they cannot do so.

The State Bar of California has existed since 1927. It is a creature of the State Constitution as implemented by legislative enactments. California statutes expressly authorize the State Bar to engage in the following range of activities: advancement of the science of jurisprudence; improvement of administration of justice; promotion of relations of the Bar with the public; advancement of the professional interests of the members of the State Bar; and performance of actions necessary to the administration and purposes of the State Bar.

The State Legislature closely supervises the scope of activity of the State Bar. The Legislature reviews the activities of the State Bar each year when authorizing annual fees payable by lawyers for the privilege of practicing law in this State. The legislative consideration of annual State Bar fees bills does not occur in a vacuum; the State Bar presents the activities planned for the year to the Legislature.* In enacting the annual fees bill, the

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*Original Superior Court File ("O.F.") 355-664 and 666-703 are examples of these presentations. In 1982, the fees bill concerned a two-year, rather than a one-year period. (O.F. 666-703.)

Legislature implicitly authorizes the State Bar activity described in the presentation.

The most detailed presentation by the State Bar to the Legislature about its activity occurred in 1981. (O.F. 355-644) This presentation included over thirty individual activities in some ten categories, excluding administrative activities. Although less detailed, subsequent and prior presentations likewise described categories of activities. These presentations show that each of the activities attacked by appellants constitutes a long-standing activity of the State Bar.

In their action, plaintiffs-appellants sought an injunction that if granted would abort a major part of long-performed functions of the State Bar expressly mandated and implicitly approved by the Legislature. The authority they cite does not, however, support the relief they requested.

II. ISSUES PRESENTED

This appeal raises the following issues:

1) May individuals restrain a governmental entity from taking positions with which they may disagree because such individuals are obligated to fund that entity through a legislatively-mandated tax;

2) Does the explicit and implicit authority given to the State Bar as a governmental entity permit the activities of which appellants complain; and

3) May individual members of the governing authority of a governmental entity be held personally liable where there is no allegation or evidence that their actions were not taken in good faith.

Respondents submit that each of these questions has been decided in controlling precedent from the United States Supreme Court, and the California courts, in favor of the State Bar and the members of its Board of Governors, and that the decision of the court below should therefore be affirmed.

III. STATEMENT OF FACTS

A. Procedural History

This action has been filed by 21 individual members of the State Bar of California, who seek to enjoin a broad range of activities by the State Bar to which they apparently object. According to appellants, the use of the fees they must pay as a result of the legislative authorization of the State Bar as an integrated bar, for activities they disapprove of, violates their First Amendment rights. Appellants seek to enjoin the State Bar from proceeding with its activities outside of the area of admissions, discipline, and regulation.

A temporary restraining order and order to show cause was entered on October 26, 1982. Respondents were ordered to show cause why they should not be enjoined during the pendency of the action from using the revenue from State Bar fees, or the name of the State Bar, "to promote any particular ideologies regarding judicial retention elections or other elections." The Court further ordered that, pending the hearing, respondents were restrained from using revenue derived from the named appellant's State Bar fees to "promote any particular criteria regarding the evaluation of judges and judicial retention elections." (O.F. 234-36.)

That order was superseded by an order continuing the hearing from November 29, 1982, to January 28, 1983.

Pursuant to stipulation, pending the hearing the respondents deposited a sum equal to the mandatory State Bar fees of all the plaintiffs named in the complaint as of December 2, 1982 in a trust account.* (O.F. 241-42.)

Appellants' motion for preliminary injunction was heard on January 28, 1983, and denied on March 4, 1983. (O.F. 983-85.) On November 22, 1983, following extensive discovery, respondents' motion for summary judgment was filed. Plaintiffs filed a Motion for Partial Summary Judgment on November 23, 1983. Plaintiffs' motion was denied on March 19, 1984. (O.F. 1752-53.) Judgment was granted in favor of all defendants on May 24, 1984. (O.F. 1754.) After plaintiffs unsuccessfully sought a writ of mandate, they filed a notice of appeal to this Court on June 18, 1984. (O.F. 1759.)

B. The History Of The State Bar And Its Activities

The State Bar was created in 1927 by the State Bar Act, Bus. and Prof. Code § 6000, *et seq.* Throughout its history, the State Bar has remained subject to the provisions of this statute. In 1960, the status of the State Bar was altered when the voters approved a ballot proposition making the State Bar a constitutional entity. A similar vote in 1966 maintained this status. (O.F. 292-93; 300.)

The creation of the State Bar in 1927 was in part prompted by concerns about inadequate professional standards and competence and by widespread recognition of the need for assistance in legal reform and improvement of judicial administration. Reference to the records of the State Bar shows that the State Bar immediately began activities to address these concerns and that many

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*The complaint was amended again, on January 13, 1983, after the Court's Order, to add additional plaintiffs.

of the programs begun by the State Bar in its early years have lasted in one form or another over the 50 years in which the State Bar has been in existence. For example, even in the earliest years of the Bar, and throughout its history, there have been programs to improve delivery of legal services to the poor, to promote reform in procedural and substantive areas of law, and to educate the public about issues affecting the State Bar. (O.F. 293-303.)

With regard to the issues raised in this lawsuit, State Bar records show that the types of activities challenged by plaintiffs here have been part of State Bar programs for many years. For example, from its inception, the Bar organized sections of members to study and propose legal reform. One of the areas addressed at that time was judicial selection and conduct. In the 1930s, the State Bar was instrumental in gaining adoption of standards for judicial selection in California. More recently the Bar has assisted in programs of judicial evaluation. Thus, activities to maintain the independence and integrity of the judiciary are not new to the State Bar. (O.F. 293-98.)

Similarly, legislative activity is not new to the State Bar. One of the most effective ways in which the State Bar can fulfill its obligations to advance the science of jurisprudence and to improve administration of justice is to suggest and promote legislation. In the early years of the Bar, members of sections studying potential legal reform were encouraged to lobby for reform. The members of the Board of Governors and Secretary of the State Bar also lobbied for adoption of legislation recommended by Bar sections. (O.F. 294-95.)

Programs to encourage participation of State Bar members in State Bar activities and programs to obtain the input of State Bar members in decisions made by that organization have also been of long standing in the State

Bar. In fact, the predecessor program to the Conference of Delegates began in the 1930s. (O.F. 295.)

These are just a few examples of how the categories of work of the State Bar have since its beginnings remained relatively constant. These examples also underscore the fact that the activities challenged by petitioners are long-standing practices of the State Bar. These practices, and the other activities of the State Bar are reviewed annually by the Legislature in conjunction with its approval of the State Bar's fees bill. The Bar has continually played a significant role in providing the legislative and executive branches with information and assistance in areas of its particular expertise.*

C. The Complaint

The complaint sought to enjoin all activity of the State Bar encompassed in the following categories:

(a) lobbying the California Legislature;

(b) submitting briefs *amicus curiae;*

(c) financing meetings of the Conference of Delegates;

(d) publicizing the speeches by the President of the State Bar; and

(e) financing the public information project on judicial retention.

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*A detailed discussion of the history of the State Bar and its activities, setting forth the matters discussed above, is included in the Declaration of Magdalene Y. O'Rourke filed in the trial court. (O.F. 289-303.)

Complaint, ¶ 6, C.T. 3-4. Appellants did not challenge any specific activity in any of the enumerated classes. Their attack was, and is, categorical.

The complaint also sought to hold the individual members of the Board of Governors liable for past expenditures of the State Bar utilized to finance its activities in these categories. Appellants sought reimbursement of all fees expended for "political and ideological purposes" (Prayer, ¶ 3, C.T. 5-6), without further specifying those activities.

IV. ARGUMENT

Respondents assert, for the following reasons, that appellants were not entitled to the relief they sought, and that the decision of the court below was correct as a matter of law:

1. the State Bar is an agency of the California state government created by Article VI, § 9 of the California Constitution and implementing legislation;

2. because the State Bar is an agency of the government it has all powers expressly or implicitly granted it by the Constitution and statute, limited only by restrictions imposed by the Constitution. *Stanson v. Mott,* 17 Cal.3d 206 (1976); *Miller v. California Commission on Status of Women,* 151 Cal.App.3d 693 (1984);

3. each category of State Bar activity and each specific activity of the State Bar mentioned in the complaint is expressly or implicitly authorized by the California Constitution and the State Bar Act. This authorization is confirmed annually by the Legislature in enacting legislation providing for financing

the State Bar after receiving the agency's proposed budget for the ensuing year;

4. no constitutional restriction precludes the State Bar from engaging in the categories of activity described in the complaint or the specific functions mentioned in it. To the contrary, two recent decisions of the United States Supreme Court reject the constitutional attack mounted by plaintiffs. *Regan v. Taxation with Representation of Washington,* ___ U.S. ___, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *Common Cause v. Bolger,* ___ U.S. ___, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983);

5. the authorities upon which appellants rely are inapplicable to agencies of government. They are pertinent only to the affairs of private organizations; and

6. a controlling decision of the California Supreme Court mandates rejection of appellants' claim that the individual members of the Board of Governors of the State Bar are liable. *Stanson v. Mott, supra.* This Court has recently rejected an indistinguishable challenge on the same grounds. *Miller, supra.*

A. California Law Permits A Public Entity, Such As The State Bar, To Engage In The Type Of Activities In Which The State Bar Engages

1. The State Bar is a Public Entity.

Article VI, § 9 of the California Constitution establishes the State Bar of California as a public corporation. The parallel legislative enactment, establishing the State Bar as a public corporation, and enumerating its powers, is the State Bar Act, Bus. & Prof. Code § 6000, *et seq.* The

California Supreme Court upheld the constitutionality of the State Bar Act, and the establishment of the State Bar as a public corporation, in *State Bar of California v. Superior Court,* 207 Cal. 323 (1929).

Public corporations constitute public entities. *See Service Employees' Int'l Union v. Roseville Community Hospital,* 24 Cal.App.3d 400, 407 (1972); *Bettencourt v. Industrial Acc. Co.,* 175 Cal. 559, 561 (1917). Like other public entities, the State Bar was created to serve governmental purposes and was accordingly vested with governmental powers. It is charged with the duty of regulating the profession and practice of law, a subject which "is essentially . . . a matter of public interest and concern . . . ." *State Bar of California v. Superior Court, supra,* 207 Cal. at 331.

Because the State Bar is a public entity, its property is exempt from taxation. As the Legislature has declared, such property is "held for essential public and governmental purposes in the judicial branch of the government . . . ." Bus. & Prof. Code § 6008. The members of the Board of Governors are public officers acting under oath. *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 566 (1960). These governmental powers, purposes, and attributes demonstrate clearly that the State Bar is a public corporation in fact as well as in theory, and that is is dedicated to public, not private ends. *See State Bar of California v. Superior Court, supra,* 207 Cal. at 330-32. Moreover, as a matter of general policy, public corporations are deemed to be public entities. *See* Gov't Code § 53050; Gov't Code § 811.2; Evid. Code § 200; *Rhyne v. Municipal Court,* 113 Cal.App.3d 807, 824-25 (1980).

Thus, the State Bar, a creature of California constitutional and statutory law, is, as a matter of California law, a public entity. Specific standards have been developed in

California defining the range of activities in which public agencies may properly engage. As demonstrated below, those standards clearly authorize the State Bar to engage in the full range of activities challenged in this lawsuit.

2. Public Entity Authority Is Tested By The Implicit And Explicit Powers Granted To The Agency By The Constitution And Legislative Action

a. *Stanson v. Mott*

The powers of public agencies in California were described at length in *Stanson v. Mott,* 17 Cal.3d 206 (1976). In that case, a taxpayer challenged the expenditure of funds by the State Department of Parks & Recreation to promote the passage of a ballot proposition. In confirming the authority of the Department to expend funds for lobbying and public information related to ballot propositions, the court first examined the scope of the authorization given to the agency to expend funds. This analysis was required by "the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment." 17 Cal.3d at 213. In determining whether the challenged activity was proper, the court looked to the various legislative authorizations pertaining to the Department.

Various opinions of the Attorney General of California have applied this same analysis to determine the propriety of expenditure of public funds under various circumstances. *See, e.g.,* 58 Ops. Cal. Atty. Gen. 29 (1975); 51 Ops. Cal. Atty. Gen 190 (1968); 42 Ops. Cal. Atty. Gen. 25 (1963); 35 Ops. Cal. Atty. Gen. 112 (1960).

b. *Miller v. California Commission*

Appellants' assertion that *Stanson* addresses only statutory authorization questions, and does not decide the constitutional issues, is clearly wrong. The Court expressed specific concern about necessary limits on government activity, 17 Cal.3d at 218, and, accordingly, set such limits. Compliance with those limits answers the constitutional questions raised by appellants, as this Court specifically reiterated in *Miller v. California Commission, supra.*

In *Miller*, plaintiffs raised a constitutional challenge to the advocacy activities of the Commission on the Status of Women, a tax-funded agency. They claimed that its action in support of principles with which they disagreed violated their First Amendment rights. The Court rejected this Proposition, holding that the government could not be prevented from speaking because of taxpayer disagreement. 151 Cal.App.3d 700-701. Indeed, the democratic process requries the government to speak. *Id.* Only where the entity does not comply with the limits set forth in *Stanson*, or drowns out the individuals, is a problem raised. 151 Cal.App.3d at 700-702. Neither situation is present here; the State Bar has complied with *Stanson*, and appellants do not claim, nor can they, that they are unable to make their views heard.

Appellants assert (A.O.B. at 2) that *Miller* does not apply, as the entity involved was funded by general taxation, rather than a special tax imposed on a limited group. That distinction is irrelevant, however. First, *Miller* itself draws the relevant distinction — between governmental entities, such as the Commission and the State Bar, and private organizations such as labor unions. 151 Cal.App.3d at 700. Second, the rules applied by *Miller* have been applied to governmental entities supported by a special tax or fee. *See Erzinger v. Regents of the Univ. of*

Calif., 137 Cal.App.3d 389, 392 (1982), *cert. denied* ____ U.S. ____ (1983). Finally, in terms of the relief suggested by the *Miller* court, redress from the Legislature, the individual member of the State Bar has an even broader right in his ability both to vote to affect the policies of the Bar by changing the membership of the Board of Governors and to seek legislative redress.

3. The Legislative Authority Explicitly And Implicitly Authorizes The Full Scope Of Current State Bar Activity

a. The Specific Authorization is Broad

Like those of other California governmental agencies, the State bar's limits are established by reference to the authorization given to it by the Legislature and the people of California. In the case of the State Bar this authorization comes from both the constitutional enactment of its existence and the legislation directing it. Like any other public corporation, the State Bar:

> "[D]erives its powers from the statute under which it is created and acts, and from such other statutes as may have been enacted by the legislature granting it additional powers or limiting those already granted." *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318, 326 (1927).

The legislative authorization for the California State Bar is both clear and broad. Among other things, the State Bar is empowered to "Do all . . . acts . . . necessary or expedient for the adminstration of its affairs or the attainment of its purposes." Bus. & Prof. Code § 6001(g). The Board of Governors of the State Bar is likewise authorized to "make appropriations and disbursements from the funds of the State Bar to pay all necessary

expenses for effectuating the purposes of this chapter." Bus. & Prof. Code § 6028(a). Finally,

> "The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." Bus. & Prof. Code § 6031.

Appellants could not and did not show that any of the challenged activities of the State Bar are outside of the scope of its authorization. Rather, appellants wish to enjoin State Bar activity solely by claiming that, because they may disagree with some or all of the positions of the State Bar, the State Bar may not use their funds to engage in such activities.

b. The Activities Of The State Bar Have Been Specifically Approved By The Legislature And The Voters

The State Bar has engaged in the activities appellants challenged since its creation. The Legislature has scrutinized these activities annually in conjunction with its approval of the State Bar's fees bill. Thus, with full knowledge of these activities, the Legislature and the people of California have maintained the State Bar Act in effect. In determining whether the challenged activities are appropriate and are within the scope of the State Bar's proper functions as a state agency, the court below was entitled to give great weight to this consistent legislative support of the activities of the State Bar.

The intent of the Legislature in enacting the State Bar Act is also of great import in determining the scope of the State Bar's powers.

> "It is well settled that in construing statutes the court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In the course of this procedure the court must take into account a variety of factors, such as the context of the legislation, its objectives, the evils to be remedied, and public policy (citations omitted). The cases are not less emphatic that contemporaneous construction of the legislation may also be considered." *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*, 59 Cal.App.3d 959, 973 (1976) (citations omitted).

See also Alford v. Pierno, 27 Cal.App.3d 682, 688 (1972).

Administrative construction of a statute and administrative practice are likewise entitled to great weight in ascertaining the meaning of the Legislature's actions. *English v. County of Alameda*, 70 Cal.App.3d 226, 240 (1977). Thus, the actions of the Legislature, both in reenacting the State Bar Act, and in approving the Bar's activities every year in enacting the fees bill, are entitled to be weighed heavily in the determination of the appropriate scope of the State Bar's authority. The State Bar's annual presentation in conjunction with its fees bill is explicit evidence of the Legislature's acute awareness of its activities.

Further, in 1960 and in 1966 the electors of California enacted Constitutional propositions to establish and maintain the State Bar as a Constitutional agency. In both elections the voters approved the State Bar's Constitutional status. The material submitted to the voters in these elections in support of, and in opposition to, the ballot propositions was submitted to the court below. (O.F. 893-303; 905-11.) Those materials, important in ascertaining the intent of the electorate, constitute powerful evidence that the concept of a State Bar, as a body

with the powers approved by the Legislature, was fully supported by California voters. *See Diamond Int'l Corp. v. Boas,* 92 Cal.App.3d 1015, 1034 (1979).

4. Appellants Have Failed To Show That The Challenged Activities Are Outside The Scope Of The State Bar's Authorization

Appellants essentially object to activities in the following five areas: (a) lobbying; (b) submitting *amicus curiae* briefs; (c) financing meetings of the Conferences of Delegates; (d) publicizing speeches of the President of the State Bar; and (e) distributing public information on judicial retention. (Complaint, ¶ 6, O.F. 3-4; A.O.B. at 3-4.)

Significantly, however, appellants have identified no areas beyond the scope of the legislative and constitutional authorization of the State Bar. In fact, all of the matters to which they object are within the scope of authorization for the State Bar.

Appellants seek to, but may not, stop the State Bar from engaging in activities because appellants apparently disagree with the positions taken by the Board of Governors, chosen in a democratic manner to set such policies. (O.F. 257-58.) Apparently appellants seek to use the catch phrase "political and ideological" to describe, and halt, any positions or activities with which they disagree. Such disagreement does not permit the silencing of the entire Bar.* *See Lehane v. City and County of San Fran-*

*Indeed, appellants' position would prohibit all government from functioning if the disagreement of a taxpayer with a position taken could halt an entire program. No government entity, including the Judicial Council, could lobby; the Attorney-General's office could not file *amicus* briefs. However, as has been demonstrated above, that result is not permitted by law.

cisco, 30 Cal.App.3d 1051, 1056 (1972). This doctrine has been clearly recognized outside of California as well.

> "It is true that [a member of the State Bar] is required to contribute to the cost of the operation of the State Bar, and he may not agree with all of the policies as determined by its Board of Governors. The Board of Governors is selected in a democratic manner.
>
> It is frequently true in a democratic society that the wishes of the minority are overruled, even though they must contribute to the cost of the programs carried forward by the majority." *Sams v. Olah,* 225 Ga. 497, 505 (Ga. Sup. Ct. 1969).

In *Sams,* the court concluded that the test for illegal expenditures is not a broad test of whether the funds are being spent contrary to the individual's wishes, but rather whether the funds were spent for the authorized purposes of the State Bar. 225 Ga. at 507. By this reasoning, the most appellants could seek to bar would be those activities demonstrably outside of the activities authorized by the Constitution and the Legislator. None of the activities objected to, however, are unauthorized.

a. Lobbying

Appellants have challenged the entire lobbying program of the State Bar, without attempting to show that any of this lobbying is outside the scope of the Bar's authority. They thus attack no specific aspect of the State Bar's program of legislative advocacy, but simply the right of the State Bar to engage in any lobbying activity at all. Lobbying by public agencies is clearly permitted under California law, so long as the lobbying is in areas within the authorized jurisdiction of the agency.

Lobbying of the Legislature concerning issues within the scope of Bus. & Prof. Code § 6031 has the explicit and implicit approval of the Legislature. It is explicitly approved on an annual basis by means of the fees bill, as set forth above. It is implicitly approved by prevailing California case law, exemplified by the leading case of *Stanson v. Mott, supra.*

Having examined the scope of legislation governing the state agency under consideration in *Stanson,* the court concluded that there had been no specific authorization for the use of public funds in the election campaigns at issue in that case. The court distinguished such expenditures from the use of funds for lobbying efforts, and noted specifically that lobbying efforts were authorized even though certain of the causes advocated might be those which some members of the public might not support:

> "[T]he legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute . . . in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave to the 'free election' of the people . . . does present a serious threat to the integrity of the electoral process." 17 Cal.3d at 218.

See also Miller v. Miller, 87 Cal.App.3d 762, 767 (1978).

The *Stanson* court made clear that even the prohibition against election campaigning did not preclude the agency from incurring any expense in connection with the election. The agency was implicitly authorized, the Court

held, to expend funds to inform potential voters. 17 Cal. 3d at 220-21. Indeed, the court stated that

> "[I]t would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity." 17 Cal.3d at 221 n.6.

Thus, the court permitted a "fair presentation of facts" but prohibited, as had earlier courts, exhortations to the voters to vote in a certain manner. The standard for the determination of propriety was established as:

> "a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." 17 Cal.3d at 222.

Within the limits set by the legislature authorization of the agency, an agency may properly expend funds for purposes related to the agency's mandate so long as the power of the government is not brought to bear unfairly upon the electoral process. The power of agencies to lobby the Legislature, however, is specifically permitted. *See Crawford v. Imperial Irrigation Dist.,* 200 Cal. 318, (1927); *Lehane, supra.*

> "If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of a government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in others, his recourse is to vote against them." 30 Cal.App.3d at 1056. *See also DeMille v. American Federation of Radio Artists,* 31 Cal.2d 139 (1947) *cert. denied* 333 U.S. 876 (1948). (majority rule permits imposition of

an assessment despite disagreement by a member with the purposes for which the assessment is levied).

Appellants obviously do not dispute that they can not only vote for state legislators, but also vote in State Bar elections, and participate in State Bar activities. Like all other members of the State Bar, they may attempt to affect policy through established mechanisms, but they may not impose their will upon the majority, or stifle the speech of the majority.

b. *Amicus Curiae* Briefs

Appellants' challenge to the State Bar's program of submitting *amicus curiae* briefs is unsupported by any showing that the program is outside of the Bar's specific authorization to advance the science of jurisprudence and to improve the administration of justice.* Again, appellants attack no specific aspect of the State Bar's *amicus* brief program but rather its authority to file *amicus* briefs in general. Certainly *amicus* briefs related to "the science of jurisprudence" and "the administration of justice" can be filed in keeping with the functions of the State Bar. Bus. and Prof. Code § 6031. The presentation of positions to a Court in a broad variety of cases parallels the legislative advocacy approved in *Stanson;* the rationale of that case is applicable.

Appellants' free speech or associational interests are in no way infringed by the amicus program. Appellants obviously do not contend that they cannot themselves file *amicus* briefs if they disagree with any position advocated

*O.F. 850-51 is a copy of the procedures and guidelines for the amicus program.

by the State Bar; as with lobbying, their individual participation is in no way prohibited.

c. The Conference of Delegates

The Conference of Delegates is an integral part of the democratic organization of the State Bar, providing a forum for the collegial discussion of causes by representatives of the lawyers of California.* Appellants attack no specific aspect of activity of the Conference of Delegates, and they point to no facts showing that the function of the Conference is outside the scope of authorized activities under Bus. & Prof. Code § 6031. Appellants have also not demonstrated that they are unable to have their views heard and considered by the Conference. Their objection apparently is that at the Conference a majority view may prevail, or unpopular views may be expressed; they therefore seek to enjoin the free speech of their fellow lawyers.

d. President's Speeches

Again appellants' attack is general, as they seek to enjoin *all* dissemination by the State Bar of the speeches of its President. The Bar is charged with undertaking activities concerning its relations with the public. Giving the public access to knowledge of the policies and activities of the Bar through the speeches of its President, along with other educational activities, is thus explicitly within the Bar's mandate and within the scope of activity permitted by *Stanson, supra.*

*O.F. 853-91 is a copy of the Conference of Delegates Handbook for 1982. This exhibit describes the Conference of Delegates program.

e. Public Information on Judicial Independence

Materials describing the public information project on judicial independence were submitted to the court below. O.F. 743-833. These documents demonstrate clearly that as to style, tenor, and timing, this ongoing project constitutes an effort by an informed agency to educate the public, fully, fairly, and impartially as to matters within its expertise. Under *Stanson v. Mott* and the other relevant authority, such a program is not only permissible, but is appropriate and socially desirable. Indeed, in light of its legislative mandate, such a program may, in fact, be an obligation of the State Bar. While it is true that an information program designed to inform the public of the fundamental characteristics of the judicial function and of the historical foundation of an independent judiciary may be said to promote an ideology, this is an ideology intimately connected with the science of jurisprudence and the administration of justice.

Once again, however, appellants seek to enjoin an entire program without alleging or putting forth any evidence that the materials assembled for that project are anything other than a fair presentation of facts and of such style and tenor that they constitute a proper attempt to inform the voters about issues concerning which the Bar has special knowledge and unique responsibilities. Rather, appellants merely assert that the project is political or ideological and thus improper. That bare assertion is incorrect.

B. The Challenged Activities Are Constitutional

Two recent decisions of the United States Supreme Court further clarify the right of a governmental entity to engage in speech activities, even though such activities are financed by taxes. The government may, in certain

instances, use tax dollars to subsidize issue-oriented speech regardless of whether there is any compelling governmental interest to support this decision. Only a rational relationship to legitimate governmental purposes is required. *Regan v. Taxation With Representation of Washington*, ___ U.S. ___, 76 L.Ed.2d 129, 138-40 (1983). The same test is mandated by the applicable California authority cited above, and governs this case.

In addition the Supreme Court affirmed without opinion the decision of a three-judge District Court in *Common Cause v. Bolger*, ___ U.S. ___, 77 L.Ed.2d 280 (1983).* In that case, the Court held that incumbent legislators may use the franking privilege without violating the constitutional rights of voters and nonincumbents despite the greater impact thus given to the incumbent's speech. The Court declined to apply a strict scrutiny analysis, because any restriction on First Amendment rights was indirect and, because it applied to all nonincumbents, was not content-related. The same is true here; any restriction is indirect and applies to all who disagree with the majority position on a broad spectrum of issues, not to any particular position.

The State Bar speaks as a government agency and must be governed by this law in all respects. Although plaintiffs allege that the State Bar purports to represent the views of its individual members, that claim is demonstrably without basis in fact and is merely an unsupportable conclusion. The State Bar speaks as a constitutional and statutory body. *See* O.F. 1139-40, 1141-42, 1612-13.

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*Such a summary affirmance is a resolution on the merits and constitutes precedential authority. *See* 12 *Moore's Federal Practice* ¶ 400.05-1 (2d ed. 1982).

The important governmental interest in the free flow of information validates each of the State Bar's activities complained of. *Regan* and *Bolger,* which are in complete accord with the ruling of the California Supreme Court in *Stanson, supra*, of this Court in *Miller, supra*, and the other authority cited, required the Court below to decide this case in favor of the State Bar; that decision should therefore be affirmed.

C. The Cases On Which Appellants Rely Do Not Affect The Controlling Case Law

Appellants seek by this action to enforce a "negative" First Amendment right — to prevent the speech of others with whom they disagree, and not to protect against any abridgement of their own speech. As we have demonstrated, this attempt is unsupported by the applicable law. The cases on which appellants rely are clearly distinguishable. These cases deal either with state-compelled financing by individuals of private organizations where the obligation to finance is limited to activities germane to the governmental interest justifying compulsion (A.O.B. at 5-8, 9-13) or "positive" First Amendment rights infringed by prevention of a person's own right to speak and associate. (A.O.B. at 8-9.)

1. *Abood v. Detroit Board of Education*

Appellants rely primarily on *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). However, *Abood* deals with compelled exactions paid by nonmembers to a private organization, in that case a labor union, and holds only that those exactions cannot be compelled for a purpose unrelated to the purpose for which organization was formed, or to discourage free-riding and the consequent labor strife. *Ellis v. Brotherood of Railway, Airline & Steamship Clerks,* ___ U.S. ___, 80 L.Ed.2d 428

(1984), which refined *Abood,* however, imposes severe restrictions upon those nonmembers who seek to negate the First Amendment rights of members.

Abood held, in pertinent part, that non-members of a labor union could not be constitutionally compelled to contribute to ideological causes they opposed. The Court held, however, that plaintiffs were not entitled to an injunction because of its effect upon the First Amendment rights of union members. 431 U.S. at 238. Instead, the Court limited plaintiffs to a mechanism that would limit fees, excluding the portion of the fees used for purposes other than those for which the union was formed. Except as it imposes such constitutionally mandated restrictions upon the injunctive remedy, *Abood* is otherwise inapplicable to the case at bar.

The difference in the nature of the payment to the private organization in *Abood* and the tax paid as fees to the governmental entity by California lawyers distinguishes the case at bar from that portion of *Abood* which provides for a limitation on dues. Plaintiffs in *Abood* were government employees who were not members of a union which had negotiated a collective bargaining agreement with the Board of Education. The agreement provided for an "agency shop," in which those employees who elected not to become members of the union were nevertheless obligated to pay the equivalent of union dues to it. This payment was designed to prevent unjust enrichment to the nonunion employee who otherwise would receive the benefit of union representation for which the union members had paid. 431 U.S. at 222.

The result in *Abood* is a direct result of an inherent limitation in the principle which allows governmental compulsion of payments to the private union in the first instance. The allowance of an agency shop as a condition

to government employment can only be justified by the special needs and benefits to be gained from that arrangement in a labor context. Thus, the First Amendment violation in *Abood* was the direct product of the use of non members' fees for purposes beyond the scope of the benefits that justified the agency shop.

The State Bar of California is not comparable to a labor union. The obligation of lawyers, each of whom is a member, to pay to finance the functions of the State Bar is imposed by constitution and statute, not contract. State Bar fees are in reality a special tax imposed upon those permitted to practice law in this State. Unlike the union in *Abood,* the State Bar has the power to exact fees from all active California lawyers, derived from the State's power to tax. The pertinent scope of authority to expend this tax is that applicable to public entities and not that applying to private organizations acting by agreement with government.

2. *Ellis v. Brotherhood*

Abood was refined by the Supreme Court in its decision in *Ellis v. Brotherood of Railway, Airline & Steamship Clerks,* ____ U.S. ____, 80 L.Ed.2d 428 (1984). That case, involving governmentally compelled dues pursuant to the Railway Labor Act, determined that only certain expenses, necessarily and reasonably incurred for the purposes of the duties of the union as exclusive bargaining representative, were statutorily permitted. 80 L.Ed.2d at 442. As to such activities, the Court found that the First Amendment posed no barrier to the use of compelled funds, as any interference with protected rights was justified by the governmental interest in industrial peace. 80 L.Ed.2d at 446-47. In making this determination, the Court cautioned that flexibility in the use of compelled

funds must be maintained. 80 L.Ed.2d. at 447, *citing Abood.*

Both *Abood* and *Ellis* hold only that the state action compelling payments used by a private organization to subsidize speech must be supported by some governmental interest which justifies the compulsion. Neither case requires that that interest be compelling, and neither requires that more narrowly drawn restrictions on the objectors' rights be substituted. In each case, the governmental interest was narrow — the preservation of labor peace and collective bargaining.

As *Regan* and *Bolger* demonstrate, however, where taxes are involved the governmental interest is broad. As long as an individual's freedom to speak is not restricted, the power to spend is vested in the legislative branch, and not the courts.

3. *Arrow v. Dow*

Appellants' reliance upon *Arrow v. Dow,* 544 F. Supp. 458 (D.N.M. 1982) is badly misplaced. In that case, a federal district court in New Mexico held that the integrated bar of New Mexico could not engage in certain specified lobbying activities if those activities were financed with mandatory dues collected by the New Mexico Bar Association. We submit that the decision of this Court in *Miller, supra,* rather than that of a single federal trial judge in *Arrow* is the persuasive authority. A decision of the district court of New Mexico is not binding on this honorable Court. To the extent that it is inconsistent with decisions of the California Supreme Court and Courts of Appeal, the case must simply be disregarded. *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal.2d 450 (1962). The facts of *Arrow* are obviously different from

the facts here, and the case was wrongly decided in any event.

Arrow does not concern the State Bar of California, which is established by the state Constitution and statute; *Arrow* concerns the integrated bar of New Mexico, a creature of a rule of court. Nothing in *Arrow* even suggests that the judicially authorized integrated bar association of New Mexico is charged with the broad scope of public duty imposed upon the California State Bar by the Constitution and statutes of this State. The *Arrow* court held that the New Mexico Bar Association could not assert as authority for its lobbying activity a general duty of lawyers to evaluate and give advice to the public on issues related to the administration of justice or improvement of the legal system. The California State Bar, however, relies for its authority not upon some general duty, but upon the Constitution of this State and the powers expressly and implicitly granted by the Legislature. The analysis of the New Mexico bar is accordingly irrelevant to California.

Moreover, *Arrow* was simply decided incorrectly. Although it purports to follow *Abood*, *Arrow* ignores the Supreme Court's explicit proscription against injunctive relief which, by restraining organization speech, would impinge upon the First Amendment rights of the majority in the organization. Any validity given to *Arrow* is seriously in question following the decision of the Supreme Court in *Ellis*, further restricting the negation of First Amendment rights of members that *Arrow* approved.

The broad reading adopted by the *Arrow* court has also been rejected by the Florida Supreme Court. In *The Florida Bar Re: Amendment to Integration Rule*, No. 61,424, decided September 22, 1983, that Court held that political activity by its bar, established by rule of Court,

was within the defined purpose of the bar "to improve the administration of justice, and to advance the science of jurisprudence." Opinion at 2.* The Court, in determining whether the challenged activities were germane, looked broadly at purpose, as the *Arrow* court failed to do.

4. Even If *Abood* Were Held To Apply, The Requested Relief Would Not Be Available

Even if the principles that *Abood* stated for private organizations were held to apply to the governmental entity involved here the relief sought would not be permissible. If *Abood* applied here, no public entity in California could act in the future. Any citizen paying taxes to support any entity could avoid payment of his taxes any time such agency presented a position with which he disagreed. Such a result would be crippling:

> "Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles, the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views." *DeMille v. American Fed. of Radio Artists*, 31 Cal. 2d 139, 150 (1947), *cert. denied*, 333 U.S. 876 (1948).

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*A copy of this opinion is attached hereto as Appendix A for the convenience of the Court.

a. The Decision In *Abood* Does Not Permit An Injunction Against The State Bar

Appellants ignore two vital aspects of *Abood*. First, *Abood's* prohibition of compulsory contribution was limited to expenditures which were both not germane to the union's duties as a collective bargaining representative and promoted political or ideological causes. Even as to those areas, however, the Court did

> "[N]ot hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of the loss of governmental employment." 431 U.S. at 235-36.

Thus, denial of the broad injunctive relief sought was upheld. 431 U.S. at 241.

b. *Abood* Limits Relief to Activities Which Are Not Germane To the Propose For Which The Organization Is Formed

In addition, appellants have made no attempt to demonstrate that the challenged activities are not germane to the purposes for which the State Bar was formed, as those purposes are defined by the California Constitution and the relevant sections of the Business and Professions Code. Instead, appellants rely on *Arrow*, which declares that any activity outside of the very narrow range of admissions, discipline, and regulation is not germane. This approach, however, fails utterly to meet the

burden placed upon plaintiffs by both *Abood* itself and the interpretation of that ruling in *Ellis*. That the *Arrow* court elected not to address this issue does not excuse appellants from this burden.

Appellants assert that *Lathrop v. Donohue*, 367 U.S. 820 (1961) supports their belief that "the elevation of educational and ethical standards" are the sole permissible activities of a unified Bar. (A.O.B. at 13.) However, an analysis of *Lathrop* shows that the reference made by the Court was to "improving the quality of the legal service available" and to "raising the quality of professional services." 367 U.S. at 843. In concluding that this defined interest was met by the activities of the Wisconsin bar, the Court reviewed those activities extensively, citing the purposes as stated in the bylaws:

> "to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged." 367 U.S. at 828-29.

The Court's review of the activities and policies of the Wisconsin Bar shows programs very similar in scope and content to the activities complained of here, including lobbying and the establishment and support of sections and committees. 367 U.S. 829, n. 7, 834-842. Thus, *Lathrop*

provides no support for appellants' attempt to impose their own beliefs on the majority of the State Bar.

5. Compelled Membership And Payment Of Dues Do Not Infringe Rights of Association

The claim that compelled membership in and payment of dues to an integrated state bar infringes rights of association has already been considered and rejected by the United States Supreme Court in *Lathrop v. Donohue, supra*. No new authority calls into question the holding of *Lathrop* and in fact a recent Supreme Court case addressing rights of association supports the trial court's finding in this case that the State Bar has not infringed appellants' rights. *See Roberts v. United States Jaycees*, 52 U.S.L.W. 5076 (1984).

a. *Lathrop v. Donohue*

Appellants attempt to underplay the significance of the precedent of *Lathrop* by focusing their discussion of the case on the Court's failure to reach a decision on the free speech issues raised in this case. The Court, however, did decide that associational rights were not infringed by association with and payment of dues to an integrated state bar, the activities of which were very similar to those of the California State Bar.

In upholding the constitutionality of the integrated bar of the State of Wisconsin, a four-justice plurality of the Supreme Court specifically held that the only compulsion involved was the compelled financial support represented by the payment of dues, not any other membership activity. The membership requirement was held to infringe no associational rights. 367 U.S. at 828, 842. In their concurring opinion, Justices Harlan and Frankfurter reached the same conclusion. 367 U.S. at 850-51.

Members of the State Bar in California are compelled only to pay their membership fees. Like the lawyers in *Lathrop*, they are not compelled to attend meetings, to voice affirmation for any position taken by the State Bar, to refrain from speaking in opposition to positions taken by the State Bar, or even to vote on issues on which they are entitled to vote as members of the State Bar. 367 U.S. at 828. Appellants do not contend otherwise. Thus, on the associational issue, *Lathrop* is the persuasive authority.

In emphasizing the multifaceted aspect of the Bar's endeavors, the plurality opinion concluded that:

> "Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." 367 U.S. at 843.

Although the Court in *Abood* noted that it did not believe that the majority in *Lathrop* had agreed on any proposition other than that the constitutional issue should be reached, 431 U.S. at 233, n. 29, that statement must be read in the context of the narrow issues presented in *Abood*. The question that was not decided by the Court in *Lathrop* concerns infringement of rights of speech.

That question was determined in California in *DeMille, supra*, which rejected plaintiff's contention that the fee requirement was unconstitutional because it represented compulsory expression. The contribution was not an individual expression of the views of the plaintiff, the Court held, nor was the use of the fund a use of his money to express his views:

"The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest. "Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union.' " 31 Cal. 2d at 149 (citations omitted).

The Court also observed that, in an organization,

[m]ere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods. And compliance — here payment by the plaintiff of the assessment — would not stamp his act as a personal endorsement of the declared view of the majority.* *Id.* at 150.

Thus, *Lathrop* is authoritative and consistent with *DeMille*. If, however, the *Abood* footnote were read broadly to limit the decision in *Lathrop*, the opinions expressed by a majority of the members of the *Lathrop* court are fully consistent with controlling California authority.

b. *Roberts v. United States Jaycees*

In *Roberts v. United States Jaycees*, 52 U.S.L.W. 5076 (1984), the Supreme Court held that application of the

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* Indeed, the Court drew an analogy to a bar association, which uses its funds to support ideas which the majority consider worthy of support, but with which courts will not interfere merely because some members disagree with that position. 31 Cal. 2d at 150.

Minnesota Human Rights Act to require the national organization of Jaycees to admit women as voting members to local Minnesota chapters did not abridge male members' freedom of association. 52 U.S.L.W. at 5081. In reaching that result, the Court defined the two aspects of protected associational rights: intimate human relationships; and association for expressive purposes relating to activities protected by the First Amendment such as speech, assembly, petition for redress of grievances, and the exercise of religion. Outside of those two narrow categories which are entitled to broad protection, the amount of protection depends on a balance of interests to determine the nature of the right at issue. 52 U.S.L.W. at 5078.

The Court found that the degree of protection afforded "may vary depending on the extent of which one or the other aspect of the constitutionally protected liberty is at stake in a given case." *Id.* Thus, determination of the nature of the right involved is a fundamental step in determining the amount of protection afforded the right:

"Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments .... We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality and other characteristics that in a particular case may be pertinent." 52 U.S.L.W. at 5079 (citations omitted).

Intimate associational rights protect individuals' freedom of choice regarding matters such as family, marriage,

and schooling. The matters involved in such association frequently fall within the zone of privacy recognized to be constitutionally protected. Such association usually involves small numbers of individuals who are closely related and such association is usually based upon highly personal choices. *See Roberts,* 52 US.L.W. at 5078-5079.

Expressive associational rights, as defined by the Court, involve the protection of "collective effort on behalf of shared goals" as a corollary of an individual's freedom to speak, worship, and petition the government. 52 U.S.L.W. at 5079. The Court set forth three ways in which governmental action might infringe on that freedom: by withholding benefits because of membership in a disfavored group; by requiring disclosure of membership in a group; or by interfering with the internal organization of a group. It was the last of these that was involved in *Roberts;* the Court found that constitutional protection may extend to choices not to associate, where a group seeks to exclude those whose interests are inimical to the purposes for which the group was formed. 52 U.S.L.W. at 5080. Infringement of such constitutionally protected associational rights is permissible only when justified by a compelling state interest. *Id.*

The issue of infringement does not arise, however, until the determination is made that the claimed rights are in fact constitutinally protected. Appellants ignore the fact that not all interpersonal dealings warrant constitutional protection, 52 U.S.L.W. at 5079, and claim infringement of their associational rights without performing the required analysis. Application of that analysis in this case shows that the nature of the rights affected and the amount of impact on these rights do not warrant constitutional protection. Neither intimate associational rights nor expressive associational rights are affected by Califor-

nia's requirement that attorneys practicing in California belong to and pay dues to the State Bar.

Association with the State Bar has none of the characteristics marking association of an intimate nature. This Court need only consider the type of relationships afforded such constitutional protection and the values underlying such protection to find the associational aspects of membership in the State Bar does not involve such personal and emotional bonds. Like the Jaycees organization, the California State Bar is large and includes members from varied backgrounds representing a variety of interests. As in the Jaycees case, "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." 52 U.S.L.W. at 5079. Compelling association with the State Bar does not enter into the realm of highly personal relationships. Attorneys need only become members and pay their fees. No further association or activity is required.

Similarly, the claimed right of the individual appellants not to associate with the State Bar does not implicate any of the expressive rights defined by the Court. Although appellants remain free to speak and act in support of their own beliefs, they wish to silence the group and interfere with the purpose for which it was formed, a purpose supported by a governmental interest in inclusion, not exclusion. Their claimed right not to associate finds no support in *Roberts.*

D. The Individual Members Of The Board Of Governors Cannot Be Held Liable

Appellants sought restitution of the sums spent for allegedly inappropriate activities from the individual members of the Board of Governors. However, appellants

have never alleged or placed on the record any evidence that those members acted in bad faith, or in any way outside of the scope of their duties as members of the Board of Governors. Under these circumstances, there is no authority for any such restitutionary order.

In fact, California state law is to the contrary. *Stanson v. Mott*, 17 Cal. 3d 206 (1976), specifically overruled an earlier decision of the California Supreme Court establishing strict liability for public officials authorizing the improper expenditure of public funds. 17 Cal. 3d at 233, *overruling Mines v. Delvalle*, 201 Cal. 273 (1972). The *Stanson* court adopted instead the requirement that public officials use

> " 'due care,' i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care." 17 Cal. 3d at 226-27.

Various factors were set forth by the Court in determining whether a public official acted with the requisite due care. They were:

> 1. whether the expenditure's impropriety was obvious;
>
> 2. whether the official knew of the possible invalidity of the expenditure;
>
> 3. whether the official relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision. 17 Cal. 3d at 227.

There is no evidence on the record showing liability under these standards. Appellants submit now, however, that they should be permitted to amend their complaint (A.O.B. at 19-20). That permission was never sought below, nor was any evidence brought forward to show that

they could so amend, or that material issues of fact existed. *Estate of Supple*, 247 Cal. App. 2d 410 (1966) cited by appellants, denied the very relief appellants seek, where, as here, no allegation of bad faith was made and where, as here, no evidence was in the record to support the allegations.

Further, although the plaintiff in *Stanson v. Mott* was permitted to amend his complaint, this permission was granted because, under the existing rule prior to *Stanson*, the *Stanson* allegations had not been required. However, such is not the case here. The *Stanson* standard has been the law since 1976, and appellants were bound by it in drafting their complaint, and now.

Further, even accepting all of the allegations of the complaint as true, there are and can be no allegations which indicate that any expenditures were obviously improper, that any member of the State Bar Board of Governors knew of any potential invalidity, or that the State Bar Board of Governors did not rely on the presumption of validity given by the legislative approval of its activities. Such allegations could not be made, in light of the Legislature's actions, and the long-standing rule of law governing public agencies in California.

There is, simply, no basis for the attempt to obtain restitution from the individual members of the Board of Governors. Thus, in any event, the summary judgment in favor of the individual defendants was properly granted, dismissing them from the lawsuit with prejudice.

V. CONCLUSION

For the reasons set forth above, respondents respectfully submit that the decision of the trial court should be affirmed in all respects.

DATED: October 2, 1984

Respectfully submitted,

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APPENDIX D

APPENDIX D

S.F. 25050

In the Supreme Court
OF THE
State of California

EDDIE KELLER, *et al.*,
Plaintiffs/Appellants/
Cross-Appellees,

v.

STATE BAR OF CALIFORNIA, ETC., *et al.*,
Defendants/Respondents/Appellees.

OPENING BRIEF ON THE MERITS OF DEFENDANTS/RESPONDENTS/APPELLEES

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This brief is submitted on behalf of the State Bar of California and the individual appellees below who are former members of the State Bar's Board of Governors.[1] These parties seek affirmance of the summary judgment entered by the trial court preserving the ability of the State Bar to fulfill its legislatively and constitutionally mandated role in California government.

I. INTRODUCTION

Plaintiffs challenge the propriety of certain fundamental categories of State Bar activities. They claim the activities violate their first amendment rights because they oppose the activities, because they consider the activities "ideological and political" and because the activities are funded by fees the Legislature requires all attorneys practicing in the State to pay annually.

The case presented by plaintiffs' pleadings was not the case decided by the Court of Appeal; while plaintiffs seek to enjoin Bar activity within broad areas outside of regulation of attorney admission and discipline, the Court of Appeal treated their claims as if they were limited objections to the use of mandatory fees for specific activities within the broad categories with which Plaintiffs disagree. From this mistaken view of the case, other errors, including the ruling that the record was inadequate to support the summary judgment, flowed.

Plaintiffs' challenge, however, is overbroad and categorical; they seek to enjoin all lobbying, all speeches by State Bar presidents, all filing of amicus briefs and all activity of the Conference of Delegates. The only specific activity challenged by Plaintiffs was the State Bar's

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[1]Defendant Phyllis M. Hix does not join in this brief, and was not a party to the proceeding in the Court of Appeal.

publication and dissemination of materials from its Independence of the Judiciary program. Plaintiffs also seek to hold individuals who served as members of the State Bar's Board of Governors personally liable for expenditures made to support the challenged activities.

The right asserted by Plaintiffs is a negative right — a right not to be associated with the State Bar or to finance indirectly speech with which they may disagree. Plaintiffs claim this right will be protected only if the State Bar is prohibited from engaging in activities that may be classified as "political and ideological." Plaintiffs assert that the State Bar is analogous to a labor union, and that federal labor union cases permit the relief they seek. Plaintiffs' claims, however, far exceed the rights recognized in the labor union cases. In fact, Plaintiffs seek greater restrictions on the State Bar's activity than those imposed on labor unions by arguing that the State Bar is unable to act at all if a category of activity falls within the all pervasive label of "political and ideological," even though the activity is germane to the State Bar's purpose. Labor unions are merely required to rebate compelled dues, rather than use them for purposes not germane to collective bargaining; they are not required to cease their activity.

Plaintiffs' claim also fails because the State Bar is a part of California government and is not analogous to a labor union. The activities of the State Bar (and its governing board) must be evaluated by the teachings of the United States Supreme Court and this Court dealing with compelled exactions that finance government speech if the proper balance is to be struck between individual rights and the rights and needs of the public for effective government. This Court's decision in *Stanson v. Mott*, 17 Cal. 3d 206 (1976) balances these interests and provides

both the scope necessary for government to govern and the predictability necessary to permit individuals serving as public officials to undertake their duties without being paralyzed by fear of liability.

Stanson held that a governmental entity can use public funds to advocate positions on matters within its statutory authorization, so long as the "style, tenor and timing" of the government speech does not taint the electoral process. Government may engage in advocacy through activities other than partisan electoral campaigning, including lobbying, so long as explicitly or implicitly authorized by statute. *Stanson* also protects the individuals who constitute government from the paralyzing effects of the broad reaching liability imposed by the Court of Appeal. Thus, this Court should affirm the application of *Stanson* to the activities of the State Bar, and to all authorized governmental activity, to ensure that government is not limited to actions and speech only on topics engendering no controversy. Only in this way can governmental action be fully informed action.

At core, this case concerns what standards control government speech and when they apply. The key issue is whether the State can, through constitutional and statutory provisions, create a governmental entity and empower it to address issues with social and political content when those activities are funded by a specific regulated group, itself intimately related to a governmental function, rather than by the public at large. The State Bar submits that while the attorneys of this State alone finance the activities of the State Bar, it is entirely proper for the State to create, empower and fund the State Bar as it has. The State Bar is a governmental entity, and Plaintiffs are, like all other taxpayers, compelled by the state to finance activities of government.

The Court of Appeal erred in treating the State Bar as a labor union and in so doing committed additional error by adopting the phrase "political and ideological" as a standard in its decision. The phrase has meaning in the labor context when a union is charged with improperly using dues compelled from union shop members or agency shop nonmembers for purposes not germane to collective bargaining. The phrase was adopted in that context by the United States Supreme Court to define one area of union activity unrelated to preservation of labor peace, which was the purpose that the Court found justified compelled association with a union. The use of the phrase is grossly misplaced (and susceptible to far broader meaning) as a test of the propriety of a governmental action. To preclude state government and its individual subparts from engaging in all activity with a "political and ideological" content would prevent government from governing, and would require it to shape its conduct to an unwieldy and inappropriately vague standard.

By failing to recognize the nature of the State Bar, by failing to analyze properly the teachings of the United States Supreme Court and this Court and by ignoring the need for clear workable standards to guide governmental entities, the Court of Appeal has built an impossibly convoluted and unworkable structure upon a foundation of sand. In no way can this structure survive the inexorable waves of logic and common sense.

II. THE STATE BAR IS A GOVERNMENTAL ENTITY

The Court of Appeal avoided application of *Stanson v. Mott* to this case by finding that "the State Bar is a unique organization which partakes of some governmental attributes and some non-governmental characteristics," and

which is not treated as government when a court deems its activities to be non-governmental (*See* Op. at 31-32). This characterization rests on a fundamental misconception of the role of the State Bar in the legal system of California, and blurs the definitive line that has previously permitted the State Bar to regulate its own activities within the confines of statute and legislative oversight.

A. The State Bar Has Been Consistently Treated As Government

The State Bar is a governmental entity created and maintained to serve the public interest in the effective functioning of the legal system. Unlike any private association, it is created by the state constitutional and statutory provisions, and is subject to the direct control of the Legislature by specific statutes and budgetary approval, and of the Supreme Court by enactment of special rules.

The State Bar was created as a public entity in 1927 and established by the voters as a constitutional entity in both 1960 and 1966. *See* Article VI § 9, California Constitution (establishing the State Bar of California as a public corporation). The parallel legislative enactment, establishing the State Bar as a public corporation,[2] and enumerating its powers, is the State Bar Act, Bus. & Prof. Code, §§ 6000, *et seq.*

All persons admitted and licensed to practice law in this state except justices and judges of courts of record

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[2]Public corporations are public entities. *See Service Employees' Int'l Union v. Roseville Community Hospital*, 24 Cal. App. 3d 400, 407 (1972); *Bettencourt v. Industrial Acc. Co.*, 175 Cal. 559, 561 (1917). *See also* Gov't Code §§ 811.2, 53050; Evid. Code § 200; *Rhyne v. Municipal Court*, 113 Cal. App. 3d 807, 824-25 (1980).

during their service in office are members of the State Bar. Bus. & Prof. Code § 6002. The State Bar is governed by a twenty-three person Board of Governors, consisting of a president elected by and from members of the Board, fifteen members elected from nine geographical districts, one member elected by the California Young Lawyers Association and six members of the public appointed on a rotating basis by the governor and officials of the Legislature. Bus. & Prof. Code §§ 6012, 6013, 6013.5. Members of the Board of Governors are public officers, acting under oath. *Chronicle Publishing Co. v. Superior Court,* 54 Cal. 2d 548, 566, 7 Cal. Rptr. 109, 354 P. 2d 637 (1960). Members of the Board and State Bar employees are also subject to state law relating to disclosure of financial interests and conflicts of interest. *See* Gov't Code §§ 87000 *et. seq.*

The State Bar funds its activities primarily through fees from its membership. Those fees must be authorized through a bill passed by the Legislature, based on a report submitted by the State Bar of all its projected activities and anticipated funding needs. *See* Decl. of M. Wailes and Ex. 1 thereto (O.F. at 260).

All property of the State Bar is held for "essential public and governmental purposes in the judicial branch of government" and is tax-exempt. Bus. & Prof. Code §§ 6008, 6008.2. Except for certain confidential proceedings, all meetings of the Board of Governors must be open to the public. Bus. & Prof. Code § 6026.5.[3] *See also* West Annot. Code, *Rules,* Pt. 2 (1986 Supp.) at 243.

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[3]The State Bar has been specifically exempted from the State Administrative Procedure Act, a fact indicating legislative recognition that the State Bar is "at least akin to a state public body or agency . . . ." *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 565 (1964).

The State Bar's duties are of a regulatory, adjudicative and informational nature. The State Bar regulates the admission to the practice of law. Bus. & Prof. Code §§ 6046, 6060. Subject to Supreme Court oversight, it has the power to formulate rules of professional conduct, Bus. & Prof. Code § 6076.5, and to discipline members who breach the rules, Bus. & Prof. Code § 6077. In adjudicating disciplinary violations, the State Bar is subject to due process requirements of notice and hearing. *In re Peterson,* 208 Cal. 42 (1929).

The State Bar is also empowered to carry on activities to improve the administration of justice and to advance the science of jurisprudence. Bus. & Prof. Code § 6031(a). The State Bar has exercised this power by using the special expertise of attorneys of the state to inform other governmental agencies and the public on law-related issues through activities such as lobbying and filing amicus briefs. Numerous other specific projects have been created under this authority. *See, e.g., Brady v. State Bar of California,* 533 F.2d 502, 503 (9th Cir. 1976) (upholding creation of California Pilot Program in Legal Specialization under § 6031(a)).

The record presented below demonstrates that the categories of activities challenged by Plaintiffs have been part of State Bar programs for many years. For example, for years the Bar has organized sections of members to propose legal reform in various areas, including judicial selection and conduct. Even in the Bar's earlier days, members of the Board of Governors and Secretary of the Bar lobbied for adoption of legislation recommended by Bar sections. (O.F. 293-98.) These and other activities of the Bar were matters of common knowledge in 1966 when the most recent provision of the California Constitution authorizing the State Bar was enacted. They have also

been subject to scrutiny by the Legislature each year that it has enacted a statute authorizing State Bar funding.

The importance of these activities to the public has been recognized by numerous decisions of this State and by the United States Supreme Court. *See Lathrop v. Donohue*, 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S. Ct. 1826 (1961); *Herron v. The State Bar*, 212 Cal. 196, 199 (1931). *See also State Bar of California v. Superior Court*, 207 Cal. 323 (1929) (upholding the constitutionality of the State Bar Act and the establishment of the State Bar as a public corporation):

> "This body of our citizenry known to the laws of this state as 'attorneys and counselors at law' *form* a integral and indispensable unit in our system of administering justice . . . Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to emoluments, is essentially and more largely a matter of public interest and concern . . . . " *Id.* at 330.

Moreover, not only does the Legislature control the State Bar's ability to fund itself, but it also contracts and expands the Bar's statutory powers. *See e.g.*, Bus. & Prof. Code § 6031(b) (1984) (prohibiting the State Bar from conducting any evaluations of the credentials of a specific justice without prior review and statutory authorization by the Legislature). Thus the State Bar, like all governmental entities, is subject to the legislative and judicial oversight that serves as a safeguard against overrreaching.

B. The Court Of Appeal Erred In Holding The State Bar Is Not Government

Despite the fact that the State Bar possesses attributes of a governmental entity and has been expressly held by this Court to be so, the Court of Appeal found the State Bar sometimes is government, and sometimes is not. Specifically, the Court of Appeal held that when the State Bar regulates the admission and practice of attorneys it is government, but when it acts to further the administration of justice (through lobbying, filing amicus briefs, etc.), it is a private entity, akin to a labor union. (Op. at 25.)

Accordingly, the Court of Appeal held that the standard for evaluating government speech set forth in *Stanson v. Mott*, 17 Cal. 3d 206 (1976) does not apply to this case. The Court based its evaluation of the State Bar (and its rejection of the applicability of *Stanson* and a later case, *Miller v. Commission on the Status of Women*, 151 Cal. App. 3d 693 (1984)) on the following: 1) the statutory language authorizing State Bar activities to advance the science of jurisprudence and to further the administration of justice is discretionary; 2) the State Bar is funded by fees paid by attorneys rather than by a statewide fund; and 3) the State Bar speaks on behalf of its members when engaged in activities such as lobbying. (Op. at 34-37.) The last of these findings is unsupported by the record; attributing significance to each of these findings misconstrues applicable law.

1. Government May Exercise Discretionary Powers

No case law supports the Courts' proposition that a governmental entity exercising discretionary powers is any less a part of government than an entity exercising mandatory powers. To the contrary, exercise of discretion

delegated by the legislature is the essence of governmental action, and courts allow governmental entities wide latitude and deference in carrying out legislative policy. *See Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, *cert. denied*, 380 U.S. 934, 13 L. Ed. 2d 821, 85 S. Ct. 940 (1964); K. Davis, *Administrative Law Treatise* § 3.9 (2d ed. 1978). In fact, some of the State Bar's regulatory powers, which the Court of Appeal conceded to be governmental, are authorized in discretionary language. *See, e.g.*, Bus. & Prof. Code § 6076.5 (State Bar may formulate rules of professional conduct). *See also Miller v. Commission on the Status of Women*, 151 Cal. App. 3d 693, *appeal dism.* U.S. , 83 L. Ed. 2d 15, 105 S. Ct. 64 (1984) (*Stanson* applied to governmental entity authorized, but not mandated, by Gov't. Code § 8246 to lobby and to inform the Legislature of its position).

2. Government May Be Funded By A Limited Group

The funding base of a public entity also is not controlling on the issue of whether it is part of government. Many governmental entities obtain significant parts of their funding from specific sources, such as assessments on those they regulate, rather than from general funds. *See, e.g.*, Pub. Res. Code § 3400 (Dept. of Conservations' supervision and protection of oil and gas deposits funded by assessments on oil and gas properties and charges on operators and royalty holders); Fish & G. Code § 700 *et. seq.*, (Dept. of Fish & Game to receive permit and license fees for its administration); *Daugherty v. Riley*, 1 Cal. 2d 298, 308 (1934) (fees collected by Department of Corporations are solely for use of that department). *See also Erzinger v. Regents of the University of California*, 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982) *cert. denied* 462 U.S. 1133 (1983) (indirect funding of abortion services

by identifiable and specific group, *i.e.*, students of University of California, did not violate first amendment).

3. Membership Is Not An Issue

The State Bar submits that the Court ignored the record in finding that the State Bar purports to speak on behalf of its members. In support of its motion for summary judgment, the State Bar submitted uncontradicted declarations of its lobbyists stating that the State Bar speaks for itself, not its members, when lobbying the Legislature. (O.F. at 1140, 1142.) The only evidence submitted by Plaintiffs on this issue was a one-page lobbying registration sheet in which the State Bar responded to a request for identification of others with a "common economic interest which is principle [sic] represented or from which membership or financial support is principally derived." (O.F. at 204.) The response of the State Bar, claimed by Plaintiffs to show the State Bar speaks on behalf of its members, was a quote from Article VI, § 9 of the State Constitution stating that attorneys shall be members of the State Bar.[4]

4. The State Bar Must Be Treated As A Single Entity

The Court of Appeal's holding that the State Bar is at one time both government and a private entity reflects an outmoded distinction rejected by the California Supreme Court as an "anachronism" and "without rational basis." *See Muskopf v. Corning Hosp. Dist.*, 55 Cal. 3d 211, 214 (1961) (tort liability of state agencies determined with-

[4] Plaintiffs concede that their claim does not concern or turn on use of the term "members." *See* "Answer to Petition For Rehearing" at 2-3.

out consideration of whether activity is governmental or proprietary).

The State Bar urges that the schizophrenic approach taken in the Court below be rejected, as it is contrary to settled authority on the operations of numerous governmental entities.[5] Instead, Plaintiffs' claims should be analyzed under the principles of *Stanson v. Mott,* as the State Bar is a governmental agency whose activities, whether discretionary or not, are authorized by state statute. Plaintiffs' expectations and interests in not supporting a governmental agency are different, and must be treated differently, than individuals' interests in not being compelled to support private non-governmental entities. *Stanson* provides the appropriate protection of first amendment rights and balancing of the competing interests at stake here.

III. CALIFORNIA LAW SETS GUIDELINES FOR GOVERNMENT SPEECH THAT PROTECT FIRST AMENDMENT RIGHTS

The balance struck by the California courts in regulating governmental entities recognizes that government must speak to govern effectively, and encourages the government to add its voice to the marketplace of ideas: "If the government cannot address controversial topics, it cannot govern." *Miller, supra,* 151 Cal. App. 3d at 701; *Stanson, supra.* Speech by the government does not inhibit the ability of individuals to express themselves when conducted, as here, within the restrictions established by those cases. Federal constitutional requirements are no different. *See* Section IV, *infra.*

[5] As for the State Bar itself, it has been treated as a governmental entity under the state tort claims act, *Engel v. McCloskey,* 92 Cal. App. 3d 870 (1970) and by the NLRB and IRS.

A. *Stanson* Strikes The Balance

In *Stanson v. Mott, supra,* this Court held that a statute authorizing the Department of Parks and Recreation to disseminate information relating to its activities allowed the Department to expend public funds to provide a "fair presentation" of relevant information about a proposed bond act. In drawing the line separating unauthorized and therefore prohibited promotional activity from proper informational activity, this Court clearly permitted the full presentation of relevant facts to the public, including an agency's view of a ballot proposal. 17 Cal.3d at 221.

The balance struck is designed to maintain governmental impartiality in electoral matters to avoid adulteration of the voters' free and pure choice, while preserving the government's ability to inform, educate and persuade. Thus, public agency lobbying is permitted because it does not distort the *legislative* process; that process contemplates that interested parties will interact with the legislature to ensure it considers their views.[6] *See* 17 Cal. 3d at 218. Moreover, government must be allowed latitude to accomplish its purposes.

> "More fundamentally, while public agency 'lobbying' efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies." *Id.*

While government may not engage in speech to manipulate democratic choices, it may inform the public so that

[6] This rationale is equally applicable to the judicial process: the submission by a public agency of an amicus brief to a court in no way distorts judicial decisionmaking.

democratic choices are informed choices. Government advances public policy and expands private choices through communication. *See* M. Yudof, *When Government Speaks* xvi (1983). Where government speech is not addressed to the electorate, as in lobbying or filing amicus briefs, danger to democratic processes is nonexistent, and government speech of this type is subject only to those limitations imposed by the legislature. *See* 17 Cal. 3d at 221, n. 6. Even where government speech may present some danger of interference with democratic electoral processes, it is permitted subject only to a court's evaluation of the property of its "style, tenor and timing," 17 Cal. 3d at 222.

The State Bar Recognizes that its status as a governmental entity is not a license to use the compelled fees of the State's practicing attorneys for any purpose. Rather the State Bar has acted within the scope of its statutory authority,[7] both implicit and explicit, when attempting to

[7]The legislative authorization for the California State Bar is clear and broad. Among other things, the State Bar is empowered to "Do all . . . acts . . . necessary or expedient for the administration of its affairs or the attainment of its purposes." Bus & Prof. Code § 6001(g). The Board of Governors of the State Bar is authorized to "make appropriations and disbursements from the funds of the State Bar to pay all necessary expenses for effectuating the purposes of this chapter" Bus & Prof. Code § 6028(a). *See also* Bus. & Pro. Code § 6025 (the Board may "formulate rules and regulations" to carry out State Bar purposes) and Bus. & Prof. Code § 6029 (the Board may appoint "committees, officers and employees as it deems necessary or proper" and pay salaries and necessary expenses.") Finally,

> "The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the

inform its members, the public, the legislature and the judiciary on important issues concerning the state legal system.

Accordingly, three of the State Bar activities challenged by Plaintiffs can be disposed of summarily under the *Stanson* analysis. First, Bus. & Prof. Code § 6031(a) authorizes the State Bar to lobby the legislature; under *Stanson* no other ground exists to challenge this activity. *See also Lehane v. City and County of San Francisco,* 30 Cal. App. 3d 1051 (1972); *Crawford v. Imperial Irrigation Dist.,* 200 Cal. 318 (1927).

Second, the filing of amicus briefs by the State Bar is also authorized by § 6031(a) as it is directly related to the improvement of the administration of justice; no rational basis supports imposition of any further limits on this activity. (*Cf. Young Americans for Freedom v. Gorton,* 91 Wash. 2d 204, 588 P. 2d 195 (1978)) (upholding power of state attorney general to file amicus brief in *Bakke* case before U.S. Supreme Court; government has a legitimate interest in informing a court of the state's interest in admissions policies that further goal of integration).

Third, the State Bar's funding of the Conference of Delegates is authorized by § 6031(a) as activity to advance the science of the jurisprudence and administration of justice. The Conference of Delegates is a forum for

> relations of the bar with the public." Bus. & Prof. Code § 6031(a).

Plaintiffs could not and did not show that any of the activities they challenge are outside the scope of the State Bar's authorization; the record below, setting forth the nature and scope of its activities, demonstrates that the activities are authorized. *See* Minute Order, Superior Court, March 19, 1984, (specifically finding that all of the challenged activities are statutorily authorized) (O.F. at 1752-54.)

expression of divergent viewpoints, permitting further dissemination of ideas.

Fourth, all State Bar activities are regularly authorized by the Legislature when it approves State Bar fees.

B. *Miller* Provides Additional Guidelines

In applying the *Stanson* criteria to the other activities of the State Bar under challenge here — dissemination of a former bar president's swearing-in speech and a public education program on the judiciary — the decision in *Miller v. California Commission on the Status of Women*, 15 Cal. App. 3d 693 (1984) is determinative. *Miller* involved a taxpayer challenge to the existence of the Commission on the Status of Women. The plaintiff requested, as have Plaintiffs in this case, that the court prohibit any advocacy by Commission officials of their views on the economic and social status of women. 151 Cal. App. 3d at 699. In completely rejecting Plaintiff's challenge to Commission speech on the basis of its ideological or political content, the court pointed out that limits on government speech do not presuppose "that government cannot add its own voice to the many it must tolerate, provided that it does not drown out private communication." 151 Cal. App. 3d at 700.

Miller recognized the distinction between adding government's voice and silencing the individual. Pointing to government's need to address controversial topics to govern effectively, the court noted that the open meeting provision of the Commission's authorizing statute, similar to that opening meetings of the State Bar's Board of Governors, enabled plaintiff to air her views before the Commission. 151 Cal. App. 3d at 701. Plaintiff's financial support of the Commission's speech did not rise to a compelled affirmation of its views, as she could openly

disagree at Commission meetings or resort to the electoral process to change its orientation. 151 Cal. App. 3d at 702.

Miller establishes in California law the principle recognized by federal law that government need not be neutral; dissenters have no right to silence governmental affirmations of the values it was elected to promote. *See* L. Tribe, *American Constitutional Law* § 12-5 at 590 (1978). Thus, Plaintiffs' challenge to former State Bar president Murray's speech and the State Bar's Public Education Project on the Judiciary on the ground that they disagree with the ideological and political viewpoint expressed is without merit.

The State Bar provides Plaintiffs with a forum in which they can express their disagreement. Through participation in its own electoral process, as well as through the state electoral process, Plaintiffs can attempt to change the State Bar's viewpoint. *See* Bus. & Prof. Code §§ 6026.5, 6012, 6013 and 6013.5. This is well recognized protection:

> "If a taxpayer can restrain a government entity from lobbying for legislation to which the taxpayer is opposed, the power of a government entity to lobby is a power which can never be exercised, for in practice some taxpayer will surely hold a contrary view. If the taxpayer does not agree with the decision of his elected representatives in this area, as in others, his recourse is to vote against them." *Lehane, supra*, 30 Cal. App. 3d at 1056.

The Court of Appeal failed to consider that Plaintiffs are free to speak on any of the issues covered by the State Bar's activities. In fact, one of the challenged activities, the Conference of Delegates, is a forum for attorneys'

viewpoints. Thus, Plaintiffs have not been silenced; they stand in the same position as other taxpayers who disagree with positions taken by governmental entities and officials, and can attempt to influence such positions by their vote and voice.

C. *Miller* and *Stanson* Apply to This Case

The Court of Appeal attempted to distinguish the State Bar from the Commission on two grounds. First, it found the Commission was established by government and authorized to speak on its behalf, with "no one . . . forced to add his or her assent to the government's voice." Second, it noted that the Commission was funded from general funds.

Neither purported distinction is a basis for halting the activities of the State Bar. As set forth above, Plaintiffs are in no way forced to affirm the government's speech nor is there any factual support for the Court's finding that the State Bar speaks on behalf of its members.

The distinction based on financing also fails. While the agency in *Miller* was funded by general revenues rather than levies on a specific group, other authority permits the funding of government actions by specific, identifiable groups. In *Erzinger v. Regents of The University of California*, 137 Cal. App. 3d 389 (1982), students of the University of California sought a declaration that the University violated their freedom of religion, guaranteed by the first amendment, by cancelling their enrollment because they refused to pay portions of enrollment fees allocated to providing abortion services. In affirming a judgment in favor of the University, the Court of Appeal held that the University had not coerced the students' religious beliefs or violated their rights to practice religion.

Thus, individuals clearly identifiable as students of the University of California were compelled to support indirectly activities they opposed on first amendment grounds in order to pursue a basic right — education. The funding base for the activities was specific and identified with the objecting students, yet the Court found no first amendment violation. The Court in *Erzinger* correctly recognized that financial support, from a specifically identifiable group to a governmental entity, is not an affirmation of belief sufficient to permit the group either to prohibit the entity's action or to refuse to fund it.

The Court of Appeal accordingly erred in refusing to apply *Stanson*, *Miller* and *Erzinger* to the State Bar's programs. The trial court properly applied the standards of these cases to the State Bar's dissemination of former president Murray's swearing-in speech on the judiciary and the Public Education Program on the Judiciary, implicitly finding on the undisputed facts in the record that the Public Education Program constituted a full presentation of relevant facts and that dissemination of former president Murray's swearing-in speech constituted a permissible presentation of the State Bar's leadership's view on judicial retention criteria to interested parties. Dissemination of the viewpoint of the leadership of the State Bar concerning judicial retention criteria poses no conceivable threat to the integrity of the electoral process; rather, it adds to the quantum of information in the public arena. Both Murray's speech and the Public Education Program offered the public another method of evaluating and thinking about judicial retention, which is a far cry from the manipulation of the electorate the *Stanson* limits are designed to prevent.

By upholding the trial court's ruling, this Court will reaffirm the principles enunciated in *Stanson* and *Miller*:

that government speech plays an important role in informing, educating and persuading the public, within the limits that it be fair and non-manipulative; and that public officials may express their views, so long as the expression is not misleading, channels of communication are open to citizens, and private speech is not drowned out. These principles protect the ability of government to govern, as well as the exercise of free choice by voters, in a way that maximizes the total amount of speech in the public arena. These principles protect the right of all citizens to have access to ideas and to hear speech.

IV. CALIFORNIA LAW COMPLIES WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

Federal law also recognizes that the public has a protected right under the First Amendment to receive a balanced presentation of views on diverse matters of public concern; the purpose of the First Amendment is to preserve an uninhibited marketplace of ideas. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L. Ed.2d 278, 290-92, 104 S. Ct. 3106 (1984) (permitting editorializing by broadcasters receiving funding from federal government). This is, of course, the same notion that underlies the *Stanson* and *Miller* decisions, which recognize the need for the government to speak and to disseminate ideas to inform the voters.

A. Federal Law Permits Government Speech

The United States Supreme Court has made clear that the government is entitled to use taxpayer funds to express, or to subsidize the expression of, a particular viewpoint. There need be no compelling governmental interest to support such expenditures; only a rational relationship to legitimate governmental purposes is required. *Regan v. Taxation with Representation of Washington*, 46 U.S. 609, 76 L. Ed. 2d 129, 138-40, 103 S. Ct. 1997 (1983) (subsidizing speech of veterans' group through tax exemption). *See also Common Cause v. Bolger*, 574 F. Supp. 672 (1982), *aff'd*, 461 U.S. 911, 77 L. Ed. 2d 280, 103 S. Ct. 1888 (1983) (summary affirmance upholding incumbent's right to franking privilege despite impact added to incumbent's speech). Taxpayer monies may be used to promote views with which other taxpayers may disagree; this does not give the objector a constitionally protected right to enjoin those expenditures. *League of Women Voters, supra*, 82 L. Ed. 2d at 295, n.16. *See also Pacific Gas and Electric Co. v. Public Utilities Comm. of Calif.*, ___ U.S. ___, 89 L. Ed. 2d 1, 18, n.3, 106 S. Ct. 903 (1986) (Marshall, J., concurring) (government subsidy of a preferred speaker causes no interference with anyone else's speech).

B. Required Association With The State Bar Does Not Violate Plaintiffs' Freedom of Association

In 1961 the United States Supreme Court rejected a claim by Wisconsin lawyers that compelled membership in Wisconsin's integrated bar violated their freedom of association. *Lathrop v. Donohue*, 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S.Ct. 1826 (1961). As is true in California, all practicing attorneys were required to be members, and the only act required was the payment of fees.

> "We therefore are confronted, as we were in *Railway Employees Dept. v. Hanson*, 351 U.S. 225, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." 367 U.S. at 828.[8]

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[8]For the Court, the associational issues raised by an integrated bar were far simpler than those raised by unions; thus having approved mandatory unions, approval of the integrated bar necessarily fol-

It is significant, however, that in Wisconsin, as in California, the mandatory bar association engaged in expressive activities. That expression was held not to violate the associational rights of the members. 367 U.S. at 827-28.

C. Speech Activity By the State Bar Does Not Implicate The Individual

The concurrence of Justices Harlan and Frankfurter in *Lathrop* addressed the Bar's activities in terms of their impact on the dissenter's speech rights as well.[9] They found the link between compulsory funding and the bar's speech far too attenuated to constitute a constitutional violation:

> "What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other hand, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 U.S. at 858.

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lowed. *See Railway Employees Dept. v. Hanson*, 351 U.S. 225, 238, 100 L.Ed 1112; 76 S.Ct 714 (1961); *Lathrop supra*, 367 U.S. at 850 (Harlan, J., concurring).

[9]The plurality opinion in *Lathrop* solely addressed the associational claim. *See id.*

That degree of association has long been a significant part of first amendment jurisprudence, especially as it relates to government action.

While the first amendment precludes the government from forcing individuals to affirm a certain belief, that affirmance must be directed in order to prevent the government from speaking. The relationship between the government speech and the individual must be sufficiently direct so as to force the conclusion that the statement is the individual's own, or to force the individual to speak to disassociate himself from that position. Thus, government cannot force an individual to recite the pledge of allegiance and salute the flag, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 87 L. Ed. 2d 1628, 63 S. Ct. 1178 (1943), nor can it force the individual to carry a slogan attached to his personal property by printing it on his automobile license plates. *Wooley v. Maynard,* 430 U.S. 705, 51 L.Ed. 2d 752, 97 S. Ct. 1428 (1977). Government expression of a point of view using taxpayer money, however, is not the kind of direct association and identification with a point of view forbidden by these cases. *League of Women Voters, supra,* 82 L. Ed. 2d. at 295, n.16.

Measuring the directness of the association with the expression in question as the test accords with the teaching of the United States Supreme Court dealing with constitutionally protected rights to associate or not associate. Not all associations deserve, or get, the same protection. Rather, a sliding scale based on the intimacy of the association determines the right. *See, e.g., Roberts v. Jaycees,* 468 U.S. 609, 82 L.Ed. 2d 462, 104 S. Ct. 3244 (1984). In *Jaycees,* the Court held that the Minnesota Jaycees organization could be required by state law to permit women to be members. Recognizing a spectrum of types of association ranging from intimate familial associ-

ation to association in impersonal, large business organizations, the Court found that while choice concerning the former is constitutionally protected, forced association with entities or persons in larger organizations at the other end of the spectrum, such as the Jaycees, may not be protected. *See also Hishon v. King & Spalding,* 469 U.S. 69, 81 L.Ed. 2d 59, 68-69 (1985) (right of partners of a law firm not to associate with a certain individual may take secondary position to other governmental and societal interests).

This case is at the other end of the spectrum from *Barnette* and *Wooley.* There is no direct association of an individual member of the State Bar with any of the public positions taken by the Bar that rises to the level of personal affirmance disapproved in *Barnette,* nor is there is a physical and constant proximity of expression similar to that forbidden in *Wooley.*

In *Pacific Gas and Electric Co. v. Public Utilities Commission of California,* ____ U.S. ____, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986), the United States Supreme Court confirmed that proximity is the critical factor. The Court refused to require a utility to include within its mailing envelope material prepared by a group opposing the utility's point of view. The Court reasoned that the physical proximity of that opposing statement could require the utility to speak to disassociate itself from the view being expressed, even though the utility may have otherwise chosen to exercise its right not to speak on that issue. 89 L.Ed.2d at 12. Like the owner of the car in *Wooley,* the utility could not be forced to use its own property to carry the message with which it disagreed. *Id.* at 13. Here, there is no proximity between the message put forward by the Bar and any individual; the difference in degree remains a difference in substance.

Moreover, the Supreme Court has made clear even where speech rights are involved that there is another fundamental consideration involved: the need to avoid content-based regulation. This overarching principle provides a standard with which *Stanson* and *Miller* comply, but with which the decision of the Court of Appeal does not. The decision of the Supreme Court in both *Pacific Gas and Electric* and *League of Women Voters* clearly relied on this principle to forbid any restriction on speech, even government supported speech, that looked to the content of the speech to determine the protection to which it was entitled. 89 L.Ed. 2d at 10-11, 15; 82 L.Ed. 2d at 294. This principle thus prohibits the kind of analysis, based on content, required by the Court of Appeal.

V. THE STANDARDS GOVERNING PRIVATE LABOR ORGANIZATIONS SHOULD NOT BE APPLIED TO THE STATE BAR

A. The Labor Union Cases Are Not Applicable

Fundamental policy distinctions necessitate rejection of the Court of Appeal's theory that the State Bar may be treated in the same manner as a labor union. Even accepting the erroneous premise that the State Bar may, in some instances, not be a governmental entity, the State Bar is still a body mandated to serve the public interest, and given the broad authority to do so. A labor union, however, is a private organization created to serve the private, economic interests of its members, not to regulate its members and educate, inform, and assist the public about matters as to which it has special knowledge and skills.

The union or agency shop situation addressed in the cases relied on by the Court of Appeal does serves a

limited purpose beyond economics, in that it promotes labor peace by avoiding free riders. However, even that interest is tied to economics, as it is intended to prevent non-members from profiting from the union's representation of the bargaining unit as a whole without payment for that benefit. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41, 10 L.Ed.2d 670, 83 S.Ct. 1453 (1963).

In contrast, the purposes of a unified bar and the mandatory fees it receives are quite different. The unified bar is the vehicle through which lawyers fulfill their obligations to themselves, the courts, and the public. Whereas a union sets mandatory dues within the context of its private organizational needs, the mandatory fees paid by lawyers to the State Bar are set by the Legislature after consideration of the programs and activities proposed by the State Bar and carried out by the State Bar in the past.

Given the significant differences in the functions, purposes, and goals of these very different organizations, it is inappropriate to adopt the same standards for judging their activities. The Court of Appeal itself recognized that the State Bar "is not just a trade union" but "bears a special public responsibility and . . . a commensurate right to speak in the public interest . . . . " Op. at 54. However, the standards applied by the Court, designed to prevent private economic organizations from infringing on the rights of their members, do not permit the State Bar the space within which to perform the functions that the Legislature and the people of California have authorized it to perform, and which the United States Supreme Court recognized as necessary to informed governance.

B. The Court of Appeal Improperly Adopted "Political and Ideological" As a Standard for Evaluating Speech of The State Bar

Union dues may be governmentally compelled as a condition of employment because collective bargaining contributes to the public's interest in labor peace, and hence must be devoted to activity that serves this interest. The phase "political and ideological and not germane to collective bargaining" defines one form of union activity that does not serve this interest.

However, the function of state government and its individual units is inherently "political and ideological." State government exists to carry out the political function of governing. Governance inherently involves choices among ideological options. The ideology of representative democracy is chosen over the totalitarian state, separation of powers is chosen over an all powerful single branch, and impartiality of the judiciary is chosen over courts controlled by the central committee of a single party state. The ideology of the rule of law is chosen over *ad hoc* determination or resolution of disputes based upon political or social status. Foundations which promote diverse viewpoints are granted tax subsidies because the ideology favoring their autonomy is chosen over another — that other taxpayers should not have their bill increased despite their disagreement.

It is, however, the interest in having government govern effectively that binds the governed in an association called "citizenship," and in subgroups within this broad category. It is this interest that justifies the imposition of taxes and fees to finance governmental activity.

The very concept of a unified bar is "political and ideological," but fully justified by the governmental inter-

est served. Lawyers must play several roles. In some, they are properly self interested, as when they associate to improve the profitability of their practices. In others, they serve the interests of particular classes of clients or geographical regions, as when they associate in special interest or regional bar associations. In the overarching sense, however, lawyers are officers of the court, and of the judicial branch. In this role their special status and monopoly requires that they serve the public interest.

The unified bar is the vehicle by which lawyers are held to serve and do serve the public interest. The State Bar is the vehicle by which self interest, special interest and regional interest are subordinated to the public interest. It is true that the concept of service to the public interest is ideological and political. It is equally true that dedication to the public interest is dedication to the governmental interest.

The mistaken use by the Court of Appeal of the phrase "political and ideological" as the touchstone of its opinion led the court into two other errors. Faced with the self evident need to permit some scope of activity to the State Bar, the Court of Appeal drew an artificial and arbitrary distinction between functions mandated by statute which it held could be performed irrespective of their inclusion within the catch phrase "political or ideological," and discretionary functions proscribed unless they could not be so classified.

Thus the court found nothing wrong with the State Bar's activity in the admission and discipline of lawyers despite the ideological nature of the concept of the practice of law as a restricted profession and the political, in the board sense, character of the administration of rules of admission and discipline. However as to the functions of administration of justice and advancement of the sci-

ence of jurisprudence assigned to the State Bar, the Court of Appeal proscribed activity fitting the catch phrase.

Having taken this step, the Court of Appeal was faced with the logical necessity of defining "political and ideological" in the context of activities of an institution not a labor union: one where the phrase does not automatically describe conduct unrelated to the relevant governmental interest. Here the Court of Appeal abandoned both logic and its labor union analogy. It eliminated germaneness from its test. Worse, the Court of Appeal failed to define the dimensions of the phrase. Rather, the intermediate court's opinion relies on examples that belie "political and ideological" as a standard. The Court of Appeal condemns a State Bar Public Education project concerning standards for evaluating the state judiciary and at the same time suggests that advocacy of six person juries is permissible (Op. at 49-51, 54), yet both are ideological and political in character. Faced with the bankruptcy of decision upon the basis of an out of context catch phrase, the Court of Appeal has in the end retreated to content-based censorship.

C. Decisions In Other Jurisdictions Dealing With Unified Bars Do Not Deal With the Issue Central to this Case

Plaintiffs have relied heavily on decisions involving other state bars, while ignoring the differences between those bars and this one. Many state bars, unlike California's, are created by the state Supreme Court, rather than an express legislative mandate. In certain of those states, the courts, in the exercise of their rule-making authority, have chosen to limit the bar's acitivities by applying *Abood*-like standards. *See, e.g., Falk v. State Bar*, 411 Mich. 63, 305 N.W. 2d 201 (1981) (Michigan State Bar).

Unlike those states, the limits on the California State Bar, as set forth above, are imposed and regulated by the legislature.

Three federal cases have also addressed issues raised by the expenditure of mandatory fees by an integrated bar. The first, *Arrow v. Dow,* 544 F. Supp. 458 (D.N.M. 1982), was a decision by a single federal district court judge, never reviewed by an appellate court. In addition, the judicial rule establishing the New Mexico bar did not mandate the broad scope of public duty imposed on the California State Bar by the Constitution and legislature. Finally, *Arrow* ignored the *Abood* prohibition against injunctive relief restraining organizational speech.

The Second case, *Schneider v. Colegio de Abogados de Puerto Rico,* 565 F. Supp. 963 (1983), rev'd and remanded, *sub. nom. Romany v. Colegio de Abogados de Puerto Rico,* 742 F. 2d 32 (1st Cir. 1984), concerned the State Bar of Puerto Rico. That case involves a situation with special problems; the Puerto Rico bar engages in activity clearly unrelated to its mandate or authority such as advocating the independence of Puerto Rico.

Finally, the Eleventh Circuit recently applied *Abood* to the Florida Bar. *Gibson v. The Florida Bar,* ____ F. 2d ____ (11th Cir, September 15, 1986, slip opinion). In that case, involving a bar created by rule of court, the Federal Court looked to *Abood* for guidance, as it found that *Lathrop* had not determined the issue. (Slip. Op. at 4) The court also relied on the Court of Appeal decision now under review by this Court. (Slip Op. at 6) As this Court has now vacated that decision, the reasoning of the *Gibson* decision on the difference between a labor union and a mandatory bar is suspect.

D. The Court Incorrectly Interpreted The *Abood* Standards

Even if the union cases were applicable to public agencies in California, the standards set forth in them have been incorrectly interpreted and applied by the Court of Appeal.

The Court of Appeal at a number of places in its opinion suggests that the Supreme Court opinions in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* 466 U.S. 435 (1984), and *Chicago Teachers Union v. Hudson,* 84 U.S.L. W. 423, 89 L.Ed.2d 232, 106 S.Ct. 1066 (1986), adopted a compelling state interest test for analysis of activities of unions that have political or ideological content. It required that the State Bar meet this rigorous test, specifically applied in other areas of constitutional jurisprudence, for its activities.[10] (Op. at 3.) *Ellis* recognized that in the union context certain germane activities, categorized without definition as political or ideological, may present an additional infringement upon individuals' rights that must be justified.[11] However, neither *Abood* nor any of the decisions that follow its guidelines adopted the compelling state interest test. Indeed, if they had, these cases could not have held that political and ideological speech of unions germane to collective bargaining may be financed with dues collected

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[10]Although the Court of Appeal held the State Bar not to be a governmental unit, it paradoxically subjected its speech to a test reserved for governmental action — the compelling state interest test. *See First National Bank of Boston v. Bellotti,* 453 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707, (1978).

[11]One example of such activity might be promotion of legislation compelling rehiring of former air traffic controllers discharged because of an illegal strike.

over the objection of a member. The public interest in labor peace that justifies this union conduct is important but by no means compelling. The conclusion that free ridership may detract from labor peace is rational but not compelled.

The Court of Appeal's ruling thus departs in the most sigrificant manner from the very precedents from which the Court claimed support for its ruling. Moreover, by applying a more stringent standard than that adopted by the United States Supreme Court, the Court of Appeal complicates what it recognizes to be a difficult task of drawing lines while permitting sufficient play for the State Bar to fulfill its duties. (Op. at 54.) The compelling state interest test invites content-based decisionmaking, limiting the ability of the State Bar, even in what the Court concedes are governmental functions, to remain free to speak, as government must, on controversial issues.

E. The Court Of Appeal's Unwarranted Expansion Of The *Abood* Test Conflicts With First Amendment Rights.

If the Court of Appeals' view were accepted, and the State Bar treated as a private organization, then the State Bar's free speech rights would have to be recognized as those of a private entity. *See First National Bank of Boston v. Bellotti,* 453 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978). The Court of Appeal's test fails to do so.

The test subjects the State Bar to the threat of post hoc judicial review of the content and viewpoint of its speech activities, allowing a particular judge to determine whether a particular speech is "ideological" or "political." However, judges, as government officials, may not impose restrictions on nonobscene speech based on either its

content or its viewpoint. *See Police Department of the City of Chicago v. Mosely,* 408 U.S. 92, 95-96 92 S.Ct. 2286, 33 L.Ed.2d 212, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, 363-64 (1976).

Moreover, the test possesses neither the clarity nor predictability necessary to prevent the exercise of protected free speech rights from being chilled. *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964) 84 S. Ct. 710, 11. L.Ed.2d 686; *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

1. *Abood* Protects Free Speech

The United States Supreme Court's test for when union speech may be financed from the members' compelled dues accommodates both the rights of the group to speak and the speech rights of dissenters not to be forced to subsidize speech unrelated to the purpose of their dues — to pay for benefits they receive from the union's collective bargaining. The Court recognized the group's right to promote the cause that brought it together; within these boundaries dissenters' speech rights are subordinate to those of the group. *Abood, supra,* 431 U.S. at 223. In the union context, the Court was able to identify categorically this core area of speech activity that reasonably related to negotiation, approval, and administration of collective bargaining agreements of the particular union and its members' employers. *Ellis, supra,* 466 U.S. at 456. All other categories of speech, such as endorsements of candidates for national office, must be financed through voluntary contributions, to groups like union political

action committees, which still may, however, speak in the union's name.[12]

The certainty and predictability of the Court's test in *Abood* and *Ellis* is evidenced by the facts of the recent *Hudson* decision: both the union and dissenters agreed in advance of litigation that certain categories of expenditures could not be financed from compelled dues; the case turned only on the sufficiency of the union's rebate procedures. 89 L. Ed. 2d 232. This functional approach not only provides group speakers with advance notice of what is forbidden, but also avoids the specter of judges passing on the content or viewpoint of union speech. The printing of a union president's speech on why a contract should be ratified, regardless of the political ideology it may express, is permitted; distribution of a speech, however innocuous, on public schools is not.

2. The Expanded Court of Appeal Test Prevents Speech

The Court of Appeal's insistence that even speech "germane to the purpose that brought the group together" must be tested further by a court for political or ideological content disturbs the balance struck in *Abood* and with it the safeguards on the State Bar's free speech. First, clarity and predictability are destroyed because the State Bar cannot know in advance which expressions a particular judge will find to be ideological or political. The court's statement that speech on jurisprudence and the administration of justice is permissible so long as it is not political or ideological provides an unworkable standard that is unconstitutionally vague. *See Kolender v.*

[12]Thus, plaintiffs' request for an injunction enjoining bar officials from speaking in the name of the State Bar is legally groundless.

Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903, 910 (1983) (vagueness doctrine is concerned with arbitrary suppression of First Amendment liberties).

"Jurisprudence," however, *is* ideological. Jurisprudence and the administration of justice are concerned with the relations of our political institutions to one another, defining their proper spheres and providing neutral criteria for evaluating political instititions, laws and procedures. *See* H. Hart and A. Sacks, *The Legal Process* 1-9 (tentative ed. 1958). They cannot be understood without resport to the ideology underlying the state system — that of constitutionalism. Politics and ideology are inextricably intertwined with the purpose and function of the State Bar as an arm of the legal system. *Cf.* Yudof, *When Government Speaks*, 171 (virtually impossible to disentangle partisan from nonpartisan speech of public officials); (*see also Regan, supra; Bolger, supra*). The standard announced in the appellate opinion thus reduces to a tautology: speech on the subject of the state's political system and its underlying ideology is permissible, so long as it is neither political nor ideological. The opinion provides no guidance to the State Bar as to what categories of speech are prohibited; lobbying the State legislature may be permitted, depending on how compelling the court finds the governmental interest served by the lobbying. Because the standard itself will only take shape as courts proceed on a retrospective, case-by-case basis, it unconstitutionally abridges the State Bar's freedom of speech. L. Tribe, *American Constitutional Law* § 12-26 at 715; *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

3. Unrestrained Personal Liability Will Inhibit Protected Speech

If State Bar officials cannot know in advance which speech may be financed through use of compelled dues, they cannot act to express any view without the risk of personal liability if any lawyer in the state later objects. State Bar officials will subject themselves to potential liability whenever they speak on a subject other than attorney admission and discipline. The chilling effect created by the court's vague standard is not merely a legal cliche; the facts of this case illustrate that the threat of personal liability on the part of State Bar officials is one that is terribly real. *Cf. NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, 418 (1963) (threat of sanctions may deter protected speech almost as potently as actual sanctions). *See also Stanson v. Mott* 17 Cal. 3d 206, 226 (1976) (rejecting strict liability for public officials because public interest would suffer if public officials are deterred from informing the public.)

The combined effect of the vagueness and content/viewpoint discrimination inherent in the Court of Appeal's approach, if adopted, could threaten to silence of the leaders of the State Bar on issues that deeply touch the practice of law, and on which they have a valuable contribution to make to public discourse. Although this is a more insidious ban on speech than the direct legislative ban on corporate speech overturned in *First Nat. Bank of Boston v. Bellotti, supra,* the effect is the same, and it is an effect that the First Amendment will not tolerate. *Id.* As Justice Powell stated in *Bellotti*, "it is by no means an automatic step from the remedy in *Abood*, which honored the interests of the minority without infringing the majority's rights, to the position . . . which would completely

silence the majority because a hypothetical minority might object." 55 L.Ed. 2d at 729, n. 34.

4. The Court of Appeal's Test Is Based On Prohibited Content-Based Discrimination

Finally, the Court of Appeal's test is defective because of its inherent content and viewpoint discrimination. The opinion does not fault the State Bar for using compulsory dues to finance the swearing-in speech of a new president, or for the distribution of the speech, or for a public education project concerning criteria for evaluating the state judiciary. Rather, the opinion candidly prohibits these speech activities because of their viewpoint. Op. at 49-50. At the same time, the opinion suggests that advocacy by State Bar officials of a change in the structure of the jury system would be permissible under its approach. Op. at 54. The only logical distinction between the prohibited and the permissible speech above is that the former is currently controversial, while the latter, at least for now, may be somewhat less controversial but approved by one panel of the Court of Appeal.[13] Thus, the Court of Appeal's opinion invites judges to pick and choose, by content and by viewpoint, issues the State Bar may address. Such judicial censorship violates the fundamental first amendment precept that governmental restrictions on speech cannot favor certain communicative contents, or particular viewpoints, over others. *Met-*

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[13]To the extent that the opinion seems to suggest that the State Bar limit its advocacy to procedural, rather than substantive issues, it flies in the face of Supreme Court rulings that a substance/procedure distinction is too nebulous to provide a workable legal standard. *See e.g., Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8, 16, (1965) (the line between substance and procedure shifts as the legal context changes).

romedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, 819, 822 (1981).

VI. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE INDIVIDUAL DEFENDANTS

A. The Judgment in Favor of the Individual Defendants was Required by Law

None of the union cases provide any basis for the imposition of personal liability. More importantly, in holding that the challengers could not halt union activity, but could only raise questions of funding, the union cases preclude any basis for personal liability for approving the challenged activities. *See e.g., Abood, supra,* 431 U.S. at 238-41.

The Court of Appeal reversed a summary judgment in favor of the individual defendants on the issue of personal liability. Although reversing the judgment, the Court held

> "that the individual defendants *may not be held responsible for expenditures which are authorized by statute* but which impermissibly impinge upon plaintiff's First Amendment rights under *Abood* and *Ellis*. This is so because, as we have noted, the Constitution does not forbid such expenditures; it only requires that they not be financed with the compulsory dues of the dissenters." Op. at 57-58 (emphasis added).

The Court thus held that the defendants could upon "a proper showing" be required to reimburse the State Bar for funds expended *in excess* of the Bar's statutory authority. *Id.* The Court, while rejecting the standard established by *Stanson* permitting liability only where there has been a showing of a lack of good faith and due care, did not state what standard *would* apply. The Court also did

not decide whether the Board members act as public officials in overseeing State Bar activities other than regulation of the practice of law. Op. at 58-59, n. 17.

The Court erred in reversing the judgment in favor of defendants because plaintiffs never alleged that the individual defendants acted without good faith or due care. Nothing in the record supports a finding that these individuals acted in bad faith or without due care. *Stanson v. Mott, supra.*[14] Plaintiffs specifically conceded that they were *not* claiming that the challenged activities were outside statutory authority. (*See* Appellants' Opening Brief at 14, 19; Respondent's Transcript, December 16, 1983 at 28; Petition for Rehearing at 7-8.) Indeed, the uncontroverted O'Rourke declaration demonstrates that in their activities, the individual defendants were following a more than fifty-year-old tradition of the State Bar (O.F. at 289-303).

Clear standards need to be enunciated to clarify to what extent and under what circumstances members of the Board, as well as other directors and officers of public agencies, face personal liability in performing their public service functions. The Court of Appeal's error in finding the State Bar sometimes does not act as government indicates other agencies may also be found to act as private associations in some instances. Individuals who direct such agencies thus face the possibility that the standards of the union cases will be applied to the activities they oversee, and that they may be personally liable if these activities are found improper long after they have been approved.

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[14]In addition, defendants cannot be held personally liable under 42 U.S.C. § 1983 because they cannot be shown to have violated "a clearly established constitutional norm." *Scott v. Dixon*, 720 F.2d 1542, 1547 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 122.

The uncertainty in the Court of Appeal's approach, if adopted by this Court, will affect numerous commissioners, agency directors and members of boards who will wonder what standards govern their work. All will fear that some of the controversial activities they oversee will someday be deemed nongovernmental. The lack of standards and guidance forces them to guess at their peril which activities will subject them to personal liability; that uncertainty could paralyze responsible individuals. The chilling effect of this prospect on such individuals' decisionmaking, and thus the ability of government to speak and govern, underlines the crucial need for standards.

B. The Court of Appeal Decision Improperly Requires The State Bar To Justify Each Of Its Activities In Response To A Categorical Challenge.

Plaintiffs have not singled out for challenge particular activities of the State Bar. Rather, they categorically challenge types of activities, for example, lobbying, filing amicus briefs and publicizing presidents' speeches. The Court of Appeal erroneously found that while defendants showed each of these categories of activity was legislatively authorized, they failed to meet their burden of proof on summary judgment because they did not justify every single activity of the State Bar within these categories:

> "The State Bar has made no showing . . . that it did not use compelled membership fees to advance political and ideological causes which were not reasonably related to the regulation of the practice of law or the advancement of the administration of justice, or if germane, which do not impose additional and unjustified burdens on First Amendment rights." (Op. at 12.)

To require an agency such as the State Bar to respond to categorical challenges by justifying every single activity within a sweeping attack improperly imposes a devastating burden on such agencies, which is not justified under Code of Civil Procedure Section 437(c). While a party moving for summary judgment has the burden to disprove its opponent's case, it need do so only with reference to the pleadings. Weil & Brown, *Civil Procedure Before Trial,* §§ 10:10, 10:116 (1984) Thus, where the complaint attacks only broad categories, seeking to preclude all activity within a category as opposed to attacking specific activity, a defendant is entitled to summary judgment if it establishes as a matter of law that any substantial activity within the category is permitted. This is particularly the case where the activity attacked is speech. *See Anderson v. Liberty Lobby, Inc.,* 54 U.S.L.W. 4755-58, (June 25, 1986) Otherwise the burden of proving validity of hundreds or thousands of items within the category is itself an impermissible burden on expression. *See id.*

C. The Undisputed Facts Establish Defendants' Right To Prevail As A Matter Of Law.

The Superior Court properly granted defendants' motion for summary judgment on a record devoid of disputed material facts, where defendants had established that their activities did not violate the first amendment under the applicable legal standards. CCP § 437c; *Angelus Chevrolet v. State,* 115 Cal.App. 3d 995 (1981) (where undisputed facts established public corporation hospital was state entity, summary judgment proper on issue of whether indemnity action could be maintained

against it). Summary judgment is the favored procedure in cases involving free speech, *Environmental Planning and Information Council of Western El Dorado County, Inc. v. Superior Court,* 36 Cal. 3d 188 (1984), and it was particularly appropriate in this case, where plaintiffs sought to impose upon State Bar officials both a prior restraint and personal liability. *See also Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County,* 222 Cal. 3d 672 (1978), *cert. denied,* 441 U.S. 961, 60 L.Ed. 2d 1066, 99 S.Ct. 2406; *Sipple v. Chronicle Pub. Co.,* 150 Cal.App. 3d 140 (1983).

It is undisputed that the State Bar lobbies the legislation for the passage of legislation, files amicus curiae briefs, has engaged in public education programs concerning the legal system, has publicized the speeches of former president Murray, and helps finance meetings of the Conference of Delegates.[15] Although throughout this litigation plaintiffs have failed to specify the activities to which they object, defendants provided the Superior Court with the summary of State Bar activities presented to the Legislature (Declaration of Mary G. Wailes, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Ex. 1 thereto), a summary of recent amicus briefs filed by it (Supplemental Truitt Declaration in Support of Defendant's Motion for Summary Judgment), a summary of the historic activities of the State Bar (O'Rourke Declaration, Defendants' Motion for Summary Judgment), a copy of the challenged public education program (Ex. 4 to Defendants' Opposition to Motion for Preliminary Injunction), and the State Bar's legislative materials (Ex. 5, 8-10 to Defendants' Opp. to Preliminary Injunction). Defendants responded to every specific allegation contained in the amended Complaint.[16]

[15]Plaintiffs in moving for partial summary judgment on the ground that these activities violated first amendment rights submitted no evidentiary material, conceding that the only disputed issues in the case are legal.

Thus, even if *Abood* applies, the Court should affirm the summary judgment on the ground that as a matter of law, the record shows that the challenged activities are germane to the purpose of the State Bar under the *Abood* standard. A trial on this issue would serve no purpose as all the material facts about the challenged activities are in the record, and further protracting these proceedings would be contrary to the policy established by this Court and the United States Supreme Court.

[16]As defendants have shown *supra,* at § VB, plaintiffs' blanket challenge to any "ideological and political activity" is of itself a meaningless phrase because of the nature of the State Bar.

VII. CONCLUSION

For the reasons set forth above, the defendants respectfully request that this honorable Court affirm the summary judgment entered by the trial court and continue the long-established standards that permit the State Bar to fulfill its functions in serving the people of California.

DATED: October 10, 1986.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, CA 90015.

On June 21, 1989, I served the within Respondents' Brief in opposition in re: *"Eddie Keller v. State Bar of California, et al"* on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Ronald A. Zumbrun
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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 1989, at Los Angeles, California.

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CE CE MEDINA